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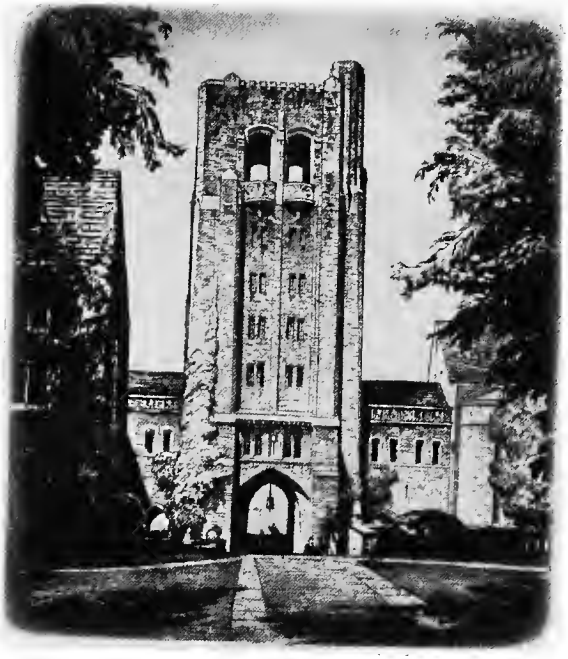

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THE ELEMENTS

OF

COMMERCIAL LAW

CONTAINING

A CONCISE AND LOGICAL EXPOSITION OF THE RULES RELATING TO BUSINESS TRANSACTIONS

A PRACTICAL TEXT-BOOK FOR USE IN SCHOOLS

BY

EDWARD W. SPENCER

Of the Milwaukee Bar

Author of "Manual of Commercial Law"

INDIANAPOLIS

THE BOBBS-MERRILL COMPANY

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PREFACE.

THIS book has been prepared in response to a demand among commercial high schools, business colleges and other institutions where business branches are taught, for a text of quite moderate size and cost, which shall fairly exhaust the more important branches and topics of commercial law. The aim has therefore been to develop quite fully the topics of greatest commercial interest and importance in all localities, and to condense or entirely omit such subjects as are of minor importance or of local interest.

Pains have been taken to make the statements of law brief, but at the same time clear and accurate, and to present the several topics in logical and convenient order.

It is hoped that the book will readily commend itself to intelligent commercial teachers, who will require no prompting from the author to enable them to put it to excellent use.

E. W. SPENCER.

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TOPICAL ANALYSIS.

LAW IN GENERAL.

LAW.

I. Positive law is
- a. International.
- b. Municipal.

II. International law is
- a. Written, consisting of treaties.
- b. Unwritten, or founded upon international usage.

III. Municipal law is
- a. Federal, including
  1. The federal constitution.
  2. The federal statutes.
- b. State
  1. Constitutions.
  2. Statutes.
  3. The common or unwritten law.

LEGAL RIGHTS, WRONGS AND REMEDIES.

I. A legal wrong the invasion of a legal right is
- a. A crime.
- b. A civil wrong.

II. Civil wrongs are
- a. Torts.
- b. Breaches of contract.

SAME—PROPERTY AND TITLE.

I. Property is
- a. Real ....
  1. Corporeal.
  2. Incorporeal.
- b. Personal
  1. Corporeal.
  2. Incorporeal, including things or *choses* in action.

II. Title .....
- a. By gift.
- b. By will.
- c. By intestate succession.
- d. By grant or contract.

III. Title may be
- a. In one.
- b. In several jointly or in common.
- c. Legal.
- d. Equitable.

SAME—REMEDIES.

I. Remedies..
- 1. At law
  - a. By judgment and execution.
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  - d. Receivers.

COMMERCIAL LAW

CHAPTER I.

LAW IN GENERAL.

§ 1. **Law defined.**—Technical or positive law—the law of the courts and lawyers—may be defined as a general rule of conduct, or of external human action, prescribed and enforced by public authority. By public authority is meant the state; and a state may be defined as a community of persons, living within certain limits of territory, under a permanent organization which aims to secure the prevalence of justice and to promote the common peace and welfare by self-imposed laws.[1]

§ 2. **International and municipal law distinguished.**—Law is either international or municipal. International law, also called the law of nations, is that system of positive rules which is prescribed by the common consent of Christian nations, and which regulates their intercourse with one another.

Municipal law, on the other hand, is not prescribed by the common consent of nations, but by the supreme power in the particular state or nation.

[1] The phrases, moral law, law of nature, law of God, divine law, law of reason or right reason, natural justice and natural equity, are also rather loosely employed, but usually to describe those rules or precepts which meet with the general approval of mankind, because they satisfy what we call the conscience or the moral sense. These are not law at all in its technical or proper sense, except as far as they are enforced by public authority as above described.

It is without binding force outside the territorial limits of such state or nation, except so far as other states or nations see fit, in exceptional cases, to recognize and apply it.

§ 3. **American law largely of English origin.**—A large part of the municipal law of the several states of the Union, with which we most frequently come in contact, was transplanted to American soil by the English colonists. An inquiry into the sources of the English law is, therefore, to a great extent, an inquiry into the sources of our own.[1]

§ 4. **Common or customary law.**—Custom is thought to be the earliest form of law-making, and much of the law which governs us had its rise in usage, or the general and long-continued observance of a certain course of conduct among our English ancestors. Law so made is called common, customary, or unwritten law, because it is not, like the written or statute law, expressed in any set form of words.

Originally enforced by public opinion or private vengeance, the state finally, by its judges, recognized these customs and assumed them to be law, and they thus acquired the force and characteristics of positive law, the same as statutes or express acts of the legislature.

Much of the common law is made up of what is called the law merchant. This consists of the general customs and usages of merchants. Many of these customs did not originate in England, but became known to Englishmen through commercial intercourse with other nations of Europe, and were incorporated into the English law by judicial and legislative sanction.

§ 5. **Equity.**—Early systems of law are inclined to be rigid and inflexible and do not readily mold themselves to the wants of advancing civilization. This was true of the common law, a fact which gave

[1] *Post*, § 6.

rise in England to a distinct court, termed the high court of chancery, which administered justice in cases where the common law was deficient, either because it failed to recognize a right, or, recognizing it, failed to afford adequate means for its enforcement. Equity in its technical sense has therefore come to mean, not natural justice, in its widest sense, as some suppose, but that particular kind of justice administered in courts following the practice of the high court of chancery in England in the exercise of its extraordinary jurisdiction. In other words, it is a system of rules and principles, forming a part of the positive law in those states and countries whose law, like our own, is derived from that of England, which, by reason of its peculiar scope and structure, supplements and supplies the deficiencies of the early common law and mitigates its rigor and harshness. Some practical examples of jurisdiction and relief in equity are found elsewhere.[1]

§ 6. **Unwritten law in America.**—The English settlers of America brought with them as unwritten law so much of their law, common, statutory, and equitable, as was adapted to their changed circumstances and surroundings. From the early English colonies, this unwritten law has been carried westward, and is in force by virtue of express or tacit adoption, and with greater or less modifications, in all the states of the Union except Louisiana. This state, being settled by the French, has a system founded upon the Roman or civil law.

§ 7. **Written law — Constitutions — Statutes— Treaties.**—The common law and the principles of equity are collected from the printed reports of decided cases, and from the writings of those learned in the law. In this sense they are written. They are not expressed in any fixed or unvarying form of words, however, but according to the taste or accu-

[1] *Post*, §§ 25, 27.

racy of the judge or writer announcing them. In this sense they are unwritten. Many laws, however, are enacted by the law-making authority in a fixed and unvarying form of words, and for this reason are called written laws, being evidenced by the records of the law-making body and the copies of such records published by authority of law

Written law with us consists of (1) constitutions, (2) statutes, (3) treaties.

§ 8. **Constitutions.**—In every country where the freedom of the subject is regarded, there is a fundamental law embodied in a written document, or implied in its institutions and usages, which defines with more or less precision the character and framework of government. In the United States the word "constitution" means the written instrument agreed upon by the people of the Union or of a particular state as the absolute rule of action and decision for all departments and officers of the government in respect to all points covered by it, which must control until changed by the authority which established it, and in opposition to which any act or ordinance of such department or officer is null and void.

§ 9. **Statutes.**—A statute is the written will of the legislature, solemnly expressed according to the forms necessary to make it a law. In this country, it is an act of congress, or of the state or territorial legislature, passed and promulgated according to the requirements of the constitution of the state or United States.

A statute may create an entirely new rule without abrogating, or, in legal phrase, repealing, any prior rule of law, common, equitable or statutory; or it may be merely declaratory of the pre-existing law and passed to remove a doubt as to its existence or limits; or it may repeal in whole or in part, some prior rule unless such rule be a part of the constitution.

§ 10. **Federal and state laws.**—Within the scope

of the powers delegated to it by the people at the adoption of the federal constitution, the general government is supreme, and all laws of the several states are inoperative and void in so far as they are in conflict with the federal constitution and the laws and treaties made under it and by its authority. So, too, all laws made by congress must conform to and find authority for their existence in the federal constitution, or they are mere waste paper.

Each state has its constitution and every law of the state must conform not only to the constitution, laws and treaties of the United States, but also to the constitution of the state enacting it, otherwise it is, in like manner with an unauthorized federal statute, illegal and void.

To such laws as are in conflict with the federal or state constitution, the term "unconstitutional law" is applied.

CHAPTER II.

OF LEGAL RIGHTS AND LEGAL REMEDIES.

§ 11. **In general.**—The primary object of law is to promote the greatest good of the greatest number. Its immediate object, however, is the creation and protection of legal rights; or, what is the same thing, the creation and enforcement of legal duties, for every right implies a duty to respect it. Whosoever disregards or invades a legal right commits a legal wrong. A wrong may be civil, in which case the state merely assists the injured party in getting a remedy; or it may be criminal, in which case the state pursues and punishes the wrong-doer through an action in its own name.

Civil wrongs are of two classes; torts and breaches of contract.

A tort is a wrong independent of contract such as libel, slander, assault, trespass and negligence.

A breach of contract is the refusal or neglect of a party to a binding agreement to perform the duties thereby imposed upon him.

Whenever a wrong has been committed by the invasion of a legal right, as by an assault and battery, or the breach of a contract, there arises in favor of the party injured and against the wrong-doer, a right to reparation consisting, ordinarily, in civil cases, of an award of money called damages.[1]

That part of the law which defines rights and duties is called substantive law.

The rules prescribing the course of action to be taken for the redress of wrongs constitute the remedial or adjective law, or the law of procedure.

[1] *Post*, § 227.

§ 12. **Property defined.**—Property, or more properly the right of property, is practically synonymous with ownership, and signifies, in general, the right in one person to have, control, enjoy and dispose of a thing to the exclusion of every other person. The term property is also commonly used to describe the object of the right of ownership, or the particular money, land, goods, or other thing over which the right is exercised.

§ 13. **Classes of property.**—Property, or things over which rights of ownership may be exercised, is divided in English and American law into two great classes, *Real and Personal*. According to Blackstone, things real are such as are permanent, fixed or immovable, and which can not be carried out of their place, as lands and tenements; things personal are goods, money, and all other movables, which may attend the owner's person wherever he thinks proper to go.

The necessity for distinguishing between real and personal property arises from the fact that they are governed by systems of law in many respects quite different, as will subsequently appear.[1]

§ 14. **Things in action and possession.**—The coins in my hand, like goods on my shelf, are so far within my possession and control that I need not resort to legal proceedings to gain the possession and enjoyment of them. They are therefore called choses (things) in possession. If payment of a debt is denied or withheld, however, my lawful remedy is by suit in court for its recovery, and my property consists of a mere right of action to compel payment or restitution. This right, which is regarded as a species of personal property, is called a chose (thing) in action. But what seems a better classification is suggested; thus:

§ 15. **Corporeal and incorporeal property.**—Such objects of ownership as can be seen, touched, and

[1] *Post*, Chap. LVI *et seq.*

appreciated by the physical senses are termed corporeal property. On the other hand, certain rights or combinations of rights recognized by law which may, by being realized and enforced, give us the enjoyment and control of tangible things, are likewise property in the eye of the law. As they can not be seen, handled or appreciated by the physical senses, they are termed incorporeal property. To this class belong choses in action, so called, including book-debts, debts due on all sorts of written securities, as bills of exchange, promissory notes, and bonds, shares in corporations, shares in partnerships, and the rights under policies of insurance. In fact, every right to proceed in a court of law or equity for the recovery of money or some valuable thing is property of this class. Many of these rights, with the securities which evidence them, may like tangible property be bought and sold, transferred and assigned. Of the same general nature are the rights of an author, either at common law or under copyright statutes, a patent, a trade-mark, and the good-will of a business, as elsewhere defined.[1] So real property is also classed as corporeal and incorporeal.[2]

§ 16. **How ownership is acquired—Title.**—The word "title" is generally used to describe the source or foundation of ownership, or the means whereby ownership is established. Title may be acquired in various ways, as for example, (1) by gift; (2) by will; (3) by intestate succession; and (4) by contract, including sale and assignment.

§ 17. **Contract as a source of title.**—The ownership of property is most frequently acquired in business life by contract, or the concurrent act of two parties whereby one makes over his title to another, not by way of gift, but in return for some price or recompense in money, labor, property, or other ben-

[1] *Post*, § 436.
[2] *Post*, §§ 772, 775.

eficial thing. The subject of contracts, which forms the body of our work, will be taken up after a few other matters of general interest have been discussed.

§ 18. **Rights of several in same property.**—Ordinarily a person owns lands or goods singly and alone. But several may acquire ownership in the same thing, by the same or different titles, and in equal or unequal shares, in which case they are either joint tenants or tenants in common.[1]

§ 19. **Legal and equitable ownership.**—In equity one may have and be protected in the beneficial use and enjoyment of property the technical or legal ownership of which is in another. Thus, if property is conveyed to A with directions to apply it to the support, education and comfort of B, A has only the legal title while B has the beneficial ownership. This is what is termed a trust. Trusts may be expressly created, or they may arise by construction or implication of equity to prevent fraud or carry out the presumed intention of the parties.

§ 20. **Legal remedies — Actions — In general.**—When legal rights are invaded, the law seldom permits the injured party to use private force in maintaining them. He must set in motion the public force by appealing to the courts, for to allow every man to take the law into his own hands would be destructive of that peace and good order which it is the object of government to establish and maintain.

§ 21. **Court, action, procedure and judgment.**—A court, or court of justice, is an agency of the state or government whose function it is to hear and decide controversies respecting legal rights and invasions thereof, and to grant remedies for the protection of rights and the redress of wrongs by the enforcement of its decisions. An action (popularly called a lawsuit) is the pursuit of a legal remedy in a court of justice. The party instituting it is called the plaint-

[1] *Post*, § 785.

iff; the party against whom it is instituted is called the defendant.

Lack of space forbids us to detail at any length the proceedings in an action. Such proceedings are regulated by rules of law, however, the object of which is to secure order, certainty and dispatch in the administration of justice. The principal steps in an ordinary action are usually as follows:

(1) The writ or summons, whereby the defendant is brought before the court or notified to defend the suit.

(2) The pleadings, or the written statements of the plaintiff's cause of action and the defendant's ground of defense.

(3) The trial or hearing, at which each party seeks to satisfy the court of the justice of his case, either by presenting evidence, or by presenting arguments and authorities upon the law.

(4) The judgment, by which the court determines the rights of the parties by deciding the question in dispute.

§ 22. **Enforcing judgment—Execution.**—Where, as in ordinary cases, a judgment for the plaintiff is for money damages, such a judgment is enforced by execution. This is a writ directed to the sheriff, authorizing him to seize and sell the defendant's property and apply the proceeds to the discharge of the judgment and costs. In other cases the judgment may direct the delivery of specific real or personal property directly to the plaintiff, or confirm his title thereto, or grant him other relief.

But the enforcement of a judgment by means of execution may fail—

(1) Because the defendant has no property whatever; or,

(2) Because what he has is exempt by law from seizure and sale on execution.

§ 23. **Same—Exemptions.**—The common law had no favors for the debtor, and the creditor, by legal pro-

cess, might hound him to the very door of the almshouse. But now, by statutes in all the states, the debtor is entitled to retain certain property free from the liability to be seized upon execution. These exemptions are based upon considerations of humanity and public policy, for the protection of poor debtors and their families. The most important exemption is the family homestead,[1] after which come wearing apparel, tools of trade, and many other things. As each state regulates this matter for itself, we must consult the local statutes and decisions for precise information.

§ 24. **Attachment.**—Among the most efficient remedies for the collection of debts are attachment and garnishment. Attachment is the actual seizure of the defendant's property in advance of the trial of the case, as security for, or as a means of obtaining satisfaction of, any judgment the plaintiff may recover. Being a harsh remedy, inasmuch as it deprives the defendant of the possession of his property before the merits of the case are determined, it is permitted only in certain specified cases.

Garnishment is a species of attachment whereby the money or property of a defendant is seized in the hands of a third party (usually an ordinary debtor), who is warned by the process of the court to hold it to satisfy the plaintiff's claim should it be made out. Both of these remedies are purely statutory.

§ 25. **Equitable relief.**—Courts of equity act somewhat differently and in many cases more effectively than courts of law. In fact, it is commonly essential, to entitle one to equitable relief, that he should have no adequate remedy at law.

While courts of law have no remedy to prevent the commission of threatened wrongs, equity will often stay or prevent a threatened mischief by injunction. This is a judicial order commanding the party against whom it is directed to refrain

[1] *Post*, §§ 783, 805.

from doing some act therein specified. Common examples of its use are to prevent the infringement of patents, to restrain the commission of serious injuries to land, to restrain the transfer of property pending suits affecting the title and to restrain the maintaining of nuisances.

Courts of equity also appoint receivers, or persons not interested in the result of the suit, to hold and preserve the property or fund in dispute when it would be improper to entrust it to either of the parties until their rights are finally determined.

Equity has also the power in certain cases to compel the actual or specific performance of a private agreement,[1] to correct mistakes therein and reform it to read as the parties intended it should, and to compel it to be canceled and delivered up in cases where it might otherwise work injustice.

[1] *Post*, § 227.

CONTRACTS.

NATURE AND CLASSIFICATION OF CONTRACTS.

I. Every contract proper involves
- a. An agreement in fact.
- b. A legal obligation.

Executed Contracts Distinguished.

II. Contracts are
- a. Formal ....
  - 1. Of record.
  - 2. Sealed or specialties.
- b. Informal...
  - 1. Express.
  - 2. Implied.

Quasi-Contracts or Those Implied in Law Distinguished.

III. Elements of true contract.
- a. Sufficient consideration or seal.
- b. Mutual consent.
- c. Compliance with legal form.
- d. A real consent.
- e. Legality.

ELEMENTS OF CONTRACT CONSIDERED.

Consideration.

I. Consideration .
- a. Defined.
- b. Necessity for.

II. Sufficient . ....
- a. Benefit to promisor.
- b. Detriment to promisee.
- c. Mutual promises.
- d. Compromise or forbearance.
- e. Need not be adequate.

III. Insufficient....
- a. Promisor already bound.
- b. Past consideration.
- c. Impossible consideration.
- d. Moral consideration.
- e. Failure of consideration.

Agreement—Offer and Acceptance.

I. Agreement involves
- a. The offer of a contract.
- b. Its acceptance.

II. Acceptance..
- a. Must be communicated.
- b. Must be absolute.
- c. Must precede lapse or revocation of offer.
- d. May be express or implied.

Parties.

I. Incompetency of parties arises from
- a. Alien belligerency.
- b. Infancy.
- c. Insanity.
- d. Drunkenness.
- e. Marriage.

Form—Writing—Statute of Frauds.

Contracts must be in writing.
- a. For the sale of real property.
- b. When not to be performed within one year.
- c. In consideration of marriage.
- d. To answer for the debts or defaults of others.
- e. For the sale of goods, etc., for more than fifty dollars, unless partly performed. (See Sales.)

Reality of Consent.

Consent to contract is unreal in cases of
- a. Mistake.
- b. Fraud.
- c. Duress.

Contracts Must Be Lawful.

Illegal contracts.
- a. Violate positive law.
  - 1. Common
    - a. Of Sunday.
    - b. Against gaming.
    - c. Against usury.
  - 2. Statutory
- b. Violate public policy
  - 1. Restraining trade.
  - 2. Restraining marriage.
  - 3. Injuring public service.
  - 4. Corrupting officers.
  - 5. Impeding justice.

DISCHARGE OF CONTRACTS.

Discharge Before Breach.

Discharge of contract may take place
- a. By agreement.
- b. By performance, including
  - 1. Payment.
  - 2. Tender.
- c. By impossibility of performance.
- d. By breach.
- e. By operation of law, including
  - 1. Merger.
  - 2. Bankruptcy.
  - 3. Alteration.
  - 4. Death.

Discharge After Breach.

A right of action for breach of contract is discharged,
- a. By the statute of limitations.
- b. By accord and satisfaction.
- c. By an award of arbitrators.

CHAPTER III.

CONTRACTS—NATURE AND CLASSIFICATION.

By far the most important legal topic in modern times is that of contracts. Business itself, from one point of view, consists almost entirely of the making and performance of the private agreements involved in the buying, selling, lending, leasing, pledging, insuring, carrying, and the serving for hire, with which we are all, to some extent, familiar.

§ 26. **Definition.**—In its proper legal sense, *a contract is an agreement enforcible at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.* It involves two ideas: (1) Agreement, (2) Obligation. In short, the parties to every contract may be regarded as making, in some sense, a law for themselves; each being bound to make his conduct conform to his agreement, or else to pay damages or be otherwise subjected to some penalty or compulsion at the hands of the courts, at the suit of the other party.

§ 27. **Executed and executory contracts distinguished.**—Before what has been agreed upon has been carried out, a contract is said to be executory; after it has been fully performed, the contract is termed executed. Executory contracts alone are within our definition, for when a contract has been executed there is no longer any obligation to do or not to do, and the bargain is of interest only as a means of ascertaining the nature and extent of the rights of ownership to which its execution has given

rise. Thus, if A buys a watch for cash, the watch is his and the money belongs to the tradesman. If A loses the watch, it is no affair of the dealer; nor does it concern A if the money is stolen from the dealer's till. An executed contract, therefore, is said not to be properly a contract at all. It is rather a present right of property which has been acquired by means of contract.[1] But a contract may be executed on one side and executory on the other, so that while one of the parties thereto has received the benefit of some completed service, or acquired a vested right of property, the other has a mere personal claim upon him, as, for example, to exact payment of the price.

An executory agreement to do an unlawful act will not be enforced, since the law can not be invoked to defeat its own ends. But if such a contract has become executed, whatever has been paid or transferred in performance of it can not be recovered back, for the law leaves the parties to a corrupt agreement where it finds them. So the law often declines to enforce agreements while executory because they are not evidenced by writing as sometimes required by statutes. If, in such a case, the parties have actually performed their agreement, it will not be disturbed.

§ 28. **Contracts are formal or informal.**—Contracts by the common law are either formal or informal. The formal contracts of the common law are contracts of record, and contracts under seal, also called deeds or specialties. All contracts not under seal, or of record, are informal, and are called *parol* or *simple contracts*, whether in writing or not.

§ 29. **Peculiarities of sealed contracts—Consideration.**—Every promise not under seal requires a consideration to make it valid. Consideration is

[1] An executed contract, however, is within the protection of the federal constitution forbidding the states to pass laws impairing the obligation of contracts.

nearly synonymous with price or recompense.[1] By the common law a sealed contract is of higher dignity and greater solemnity than a simple one. It derives its validity from its form, and not from the presence of a consideration, and is valid, as a rule, and may be enforced, though not founded upon a consideration. In some states, by statute, a seal upon an executory contract raises a mere presumption of consideration, and in a few states the distinction between sealed and unsealed contracts is abolished, and a consideration is presumed in favor of all written contracts, until its absence is shown.

A sealed contract being of higher dignity than a simple one, if parties have entered into a sealed contract covering all the terms of a prior simple contract, the latter is merged or swallowed up in the deed, and hence discharged. By statute, also, in the majority of states, the right of action upon a simple contract is barred, and the remedy for its enforcement taken away after some comparatively short period (usually six years), but the right of action for the enforcement of a sealed contract often survives as long as twenty years.

§ 30. Sealed contracts—How made—Escrow.—A deed or specialty is a writing upon paper or parchment, signed, sealed and delivered.[2] Signing alone does not make the writing a deed. It must be sealed. At common law a seal was an impression on wax or wafer affixed to an instrument. The statutes of many states, however, give to a mere scroll or scrawl, drawn with a pen opposite the signature of the party sealing, the same effect as a common law seal. But unless the statute authorizes it, such a scroll is without effect. The last step in making a sealed contract is the delivery, and this is absolutely essential to give it legal operation. Delivery is effected by handing

[1] *Post*, § 36.

[2] The word deed is also used, in a more restricted sense, to describe an instrument conveying the title to land, termed more fully a deed of conveyance. *Post*, § 790.

the instrument over to the party in whose favor it is to operate, or by otherwise relinquishing control of it in his favor, with intent to put it in force. One who makes a grant or promise under seal is called a grantor, obligor, or covenantor; one who receives it is called the grantee, obligee, or covenantee.

Where a deed is delivered, not directly and absolutely to the grantee or obligee, but to a stranger (one not a party) to be delivered to the former only when some event happens, or some condition is performed, it is called an escrow. Delivery to the grantee, or obligee, or his agent, makes a deed absolute instead of an escrow. If the party to whom a deed is delivered in escrow delivers it over to the grantee or obligee before the condition is performed the deed is without effect. Promissory notes and other unsealed writings obligatory are sometimes delivered in escrow.

§ 31. **Contracts of record.**—Of the contracts of record, so called because they are evidenced by the records of a court, judgments only are of particular interest. While a judgment for money damages creates an obligation to pay, it differs from a true contract in that it does not rest upon the consent of the party bound. Though it may be enforced by an action in form upon contract, it may also be enforced by execution against the debtor's property.[1] It is a security of higher dignity than a sealed or simple contract, and unless reversed or vacated, it imports absolute verity and binds absolutely the parties thereto and their privies, merges and extinguishes the contract or other matter upon which the action leading up to it was founded, and in most states, remains enforcible for the same period as a sealed instrument, or longer.

§ 32. **Express and implied contracts.**—Express contracts are such as arise from the words of the parties, whether written or oral, showing an intention

[1] *Ante*, § 22.

to be bound. But express words are not always necessary to a valid contract; it may be implied, thus:

§ 33. **Contracts implied in fact.**—Every true contract is the result of an agreement. But this agreement may be inferred as a fact from what the parties have done as well as from what they have said or written. Thus, if A orders goods of B in the course of trade, it is a fair inference that he intends to be bound for their value, though he makes no express promise to pay. So, if in like circumstances he orders B to make him a suit of clothes, or to shingle his house, and B thereupon does as requested, a promise to pay B's reasonable charges will be implied.

§ 34. **Contracts implied in law.**—In many cases, the law will impose upon a party an obligation, enforcible by an action in form upon contract where there is an entire absence of assent in fact, and, in many cases, notwithstanding his clear dissent. Thus, a party who in good faith supplies necessaries to an insane person, an idiot, or a person suddenly bereft of all sense and reason by a stroke of accident or disease, may recover their reasonable value in an action in form upon contract. So one may recover, in a like action, money paid under duress, or under mistake of fact, or upon a consideration that has failed, or money obtained from him by fraud.

It is obvious that these so called "contracts created by law" are not true contracts at all but creations of law enforcible like contracts, for the purpose of doing justice between the parties. They are sometimes called *quasi*-contracts.

§ 35. **Formation of a simple contract.**—Most of the business of the world is carried on by means of simple contracts, sometimes expressed in writing in more or less orderly form, but quite often merely oral, and, in many cases, wholly or in part implied. We

will now direct our attention chiefly to the formation of simple contracts, to the validity of which the following elements are essential:

(1) A sufficient consideration.

(2) Mutual consent expressed in offer and acceptance.

(3) Parties capable of contracting.

(4) A real consent.

(5) Compliance with the forms prescribed by law.

(6) A lawful object.

CHAPTER IV.

CONSIDERATION.

§ 36. **Nature and necessity—Gift.**—It is a settled rule of English and American law that every executory contract not under seal requires a consideration to support it. In law, consideration does not mean forethought or deliberation. It is nearly synonymous with price or recompense, and has been well defined as *something esteemed in law as of value in exchange for which the promise in a contract is made.* For this reason a mere promise to make a gift of property or services is void in law, though a gift once made is irrevocable.

§ 37. **Seal.**—We have already seen that a promise under seal is valid without a consideration, being binding on account of its form alone, though this rule has undergone statutory changes in some states.[1]

§ 38. **Essentials — Benefit and injury — Parting with legal rights.**—In order to be valuable, the consideration must consist, it is said, in some right, interest, profit or benefit accruing to the promisor, or some forbearance, detriment, loss, responsibility, or inconvenience given, suffered, or undertaken by the promisee. In most mercantile dealings there is an element of benefit and injury on both sides, for each party parts, or agrees to part, with some thing valuable or beneficial for some thing he deems valuable or beneficial in return. Yet, a consideration, in order to be valuable, need not be so much a benefit to the promisor as a detriment to the promisee. Thus, if A writes to X, saying, "give B goods on credit, and

[1] *Ante*, § 29.

I will pay you if B does not," A is bound to X if the credit is given, because X has suffered a detriment in parting with his goods at A's request.[1] And the bare waiver of legal rights by the promisee, though there be no real detriment to him and no real benefit to the promisor, at whose request it is done, is a sufficient consideration for a promise. Thus, an uncle promised to pay his nephew $5,000 if he would not drink, use tobacco, swear, or play cards for money until he came of age. The nephew, having performed, recovered the money, the restriction upon his lawful freedom of action being a sufficient consideration for the uncle's promise.

Marriage is a valuable consideration, and will support either a promise or a grant.

§ 39. **Promise for a promise.**—A promise is a sufficient consideration for a promise, so that A's promise to deliver goods or render services is a good consideration for B's promise to accept and pay for them. This rule is also exemplied by mutual promises of marriage, the promise on the one side forming a sufficient consideration for the promise on the other. But mutual promises must be made at the same time and must, as a rule, be mutually binding.

§ 40. **Compromise—Forbearance.**—Besides being beneficial to the parties, the prevention of litigation is favored by the law. The compromise of a disputed right or claim is a sufficient consideration to support a promise, and it is immaterial that the claim turns out to be in fact unfounded, provided it be put forward in good faith by one who believes on reasonable grounds that he has a legal right.

And a promise to forbear for a definite time to sue upon a well-founded claim is sufficient consideration to support a promise by the debtor to perform something additional to that for which he was already bound.

§ 41. **Adequacy of consideration.**—So long as there

[1] *Post*, § 693.

is some consideration it need not be adequate, provided there be no fraud, undue influence or compulsion. But if these wrongs are alleged, inadequacy of consideration may serve to prove them, though usually it is not by itself sufficient proof without other facts which point toward their existence.

§ 42. **Where promisor already bound.**—A promise to do, or the actual doing of what one is already bound to do either by law or contract, is not a sufficient consideration for a promise on the other side.

A common example is where one who has undertaken to build a house or other structure threatens to abandon his contract unless an extra price is paid. In such case a promise to pay him more than the original contract called for is void, unless in consideration of such promise, the manner, mode or time of performing is altered to the detriment of the contractor or to the advantage of the owner. Upon the same principle the mere part payment of a liquidated claim already due is no consideration for the creditor's promise to give up the rest.[1]

§ 43. **Past consideration.**—A promise made in consideration of an act or forbearance on the part of the promisee, for which there was no expressed or implied promise to pay at the time, is not a sufficient consideration for a promise. Thus, if the creditor, without any agreement or request to do so, has voluntarily forborne to sue his debt, this is no consideration for a subsequent promise by the debtor to pay him for such forbearance. So, if one had sold goods without warranty, afterwards gives one, some new consideration must pass or the warranty is void.

§ 44. **Impossible consideration.**—A promise to do what is in its nature legally or physically incapable of performance at the time it is made is invalid, and is not a sufficient consideration for a promise on the other side. A promise to construct a "perpetual mo-

[1] *Post*, § 246, *et seq.*

tion," or to go from New York to London in three hours, would be deemed physically incapable of performance. An agreement to pay money to one's self, or an undertaking by a servant that he will, of his own act, discharge a debt due to his master, is legally impossible.

§ 45. **Moral obligation.**—A mere moral obligation, however strong, will not uphold a promise. Thus a son of full age who had ceased to be a member of his father's family, was taken sick among strangers, and being poor and in distress, was relieved by the plaintiff. The father afterward promised to pay the plaintiff his expenses, but the promise was held void. But a moral obligation which would also be a legal one, except for the intervention of some rule of positive law, is sufficient to support a promise. Upon this ground the courts uphold a promise to pay a debt barred by the statutes of limitations, or by a discharge in bankruptcy.

§ 46. **Failure of consideration.**—Where the consideration upon which a promise is founded or money has been paid has wholly failed and come to naught, such promise will not sustain an action, and the money so paid may be recovered back. Thus, if one sells goods warranting the title, which proves wholly bad, the buyer may rescind and defend against an action for the price, or recover the price if paid. A note given for a void patent is subject to this defense, and money innocently paid for counterfeit or forged notes may be recovered upon the same principle. But failure of consideration must be carefully distinguished from a mere failure to benefit thereby, and if one should give his note for a valid patent right, without fraud or other wrong, he could not defend against its payment because later inventions made the patent worthless, or it proved valueless in itself. So, if one buys a title mutually understood to be doubtful, he can not set up as a defense or as a ground of recovery the fact that it proved bad.

A partial failure of consideration may constitute a defense *pro tanto*, or enable the injured party to recover the value of so much as has failed, even when he can not or does not avoid the contract.

CHAPTER V.

THE AGREEMENT—OFFER AND ACCEPTANCE.

§ 47. **Agreement defined—Elements.**—Every true contract is the result of an agreement, and an agreement arises where there is an offer of a contract on the one side, accepted on the other. Every agreement may be resolved, therefore, into two elements, (1) offer, and (2) acceptance.

§ 48. **The offer.**—In order that an offer may, upon acceptance, ripen into a contract, it must be either actually or apparently the offer of a contract. Thus, an offer of a mere social engagement does not, though accepted, constitute a contract, for no change of legal relations is intended, and the same is true of an offer clearly made in jest.

§ 49. **Assent—How manifested.**—As a general rule, neither the offer or the assent thereto need be manifested in any particular way. It may be shown by the signing and delivering between the parties of a formal writing, or by a nod, or by the doing of an act, or the rendering of a service by one which was requested by another under circumstances importing a promise to pay. The sending of an order to a merchant is an offer to buy, and the sending of the goods by him constitutes its acceptance. So in sales by auction, each bid constitutes an offer to buy at the price bid, while its acceptance is manifested by the fall of the auctioneer's hammer.

§ 50. **Acceptance must be unconditional and identical in terms with the offer.**—The acceptance must in every respect correspond to the offer. It must meet and cover it in every material way,

neither going beyond nor falling short of the terms proposed. If it embodies any new terms or conditions, or rejects or varies any term proposed, it is a mere counter-proposal or offer, which will ripen into a contract only when accepted.

§ 51. **Offerer may prescribe manner, time and place of acceptance.**—The offerer has the right to prescribe the time, place, form, or other conditions of acceptance. If he does so the acceptance must, to be effectual, conform thereto. Thus, if it prescribes acceptance by return mail, an acceptance by a later mail is not sufficient, unless, perhaps, it leaves on the same day the offer is received.

§ 52. **Time of acceptance.**—The offer must be accepted while it still continues open, and an acceptance after the offer has lapsed or has been withdrawn has no effect. An offer not by its terms continuing will be deemed to continue a reasonable time, unless sooner withdrawn. What is reasonable time depends upon the circumstances of the particular case. If the party addressed goes away and returns the next month, or the next week, and says he will accept the proposition, he is too late unless the offerer assents in turn, and so, probably, if he comes the next day, or the next hour, or perhaps if he went away at all. If the offer is by its terms to continue a definite time, it will become binding by acceptance within that time unless it is sooner withdrawn. An acceptance after the prescribed time is too late, however, unless the proposer assents in turn.

§ 53. **Revocation of offer**—As mere offer unaccepted does not constitute a contract, it may be withdrawn at any time before acceptance, even though it was, by its terms, to continue a definite time, unless the offering party has something of of value for keeping it open, upon the technical ground that there is no consideration for his undertaking to hold it open.

§ 54. **Mode of revocation.**—Unless the offer has

lapsed, it can be withdrawn only by notice to the party to whom it was made. The ordinary mode of revocation is by express notice. But the form is immaterial, and disposing of a thing offered for sale is a sufficient withdrawal, if the offeree, before acceptance, has knowledge of the facts. The death or insanity of either party revokes the offer.

§ 55. **Contracts by mail and telegraph.**—An offer by mail remains open for a reasonable time after it has reached the offeree, and will lapse with the expiration of such time. So, it may be revoked by notice actually communicated to the party addressed at any time before it is finally accepted. The mere mailing of a letter withdrawing an offer contained in a previous one is not sufficient; the letter of withdrawal must be actually received by the offeree before he has mailed his acceptance. But the acceptance of an offer by mail is deemed complete the moment the acceptance is mailed, properly addressed and postage prepaid, and it is immaterial that such letter of acceptance is delayed, or is lost in the mails and is never delivered to the party offering. If the offer in terms makes the actual receipt of the letter of acceptance a condition precedent to a contract, it must actually reach the offerer within the time prescribed and before the offer has been withdrawn. Similar principles apply to contracts by telegraph, and a contract so made is ordinarily deemed complete the moment the message of acceptance is handed to the operator.

§ 56. **General offers to the public.**—An offer need not be made to an ascertained person. Thus, a party is bound by contract to pay a reward for the return of lost property, or the conviction of a criminal, where he has by public advertisement offered to give it, and some one with knowledge of the offer has come forward and rendered the service specified. Such an offer may be withdrawn by the same means used to make it public.

CHAPTER VI.

PARTIES TO CONTRACTS.

§ 57. **Two parties required.**—As a party can not sue himself or have any right enforcible at law against himself, it follows that to every contract there must be at least two parties. But marriage, and, perhaps some other contracts aside, there may be more than two, and one or several on one side may promise to one or several on the other.

§ 58. **Of the competency of parties.**—The term competency, when used of a party to a contract, imports his power or capacity to make a contract binding and enforcible at law. One who lacks such power is incompetent. Those who, by our law, are incompetent to a greater or less degree, are, commonly: (1) Aliens; (2) corporations; (3) infants; (4) insane persons; (5) drunkards; (6) married women.

§ 59. **Alien enemies.**—When war breaks out the law prohibits all intercourse between subjects of hostile nations, so far, at least, as it is inconsistent with a state of war. Contracts entered into during war, except by license, express or implied, are illegal and void, upon the ground that to permit them would tend to place considerations of private interest and private gain before the duties of patriotism. While contracts made during war can not be enforced after the return of peace, the remedies for the enforcement of pre-existing contracts are merely suspended during war and revive when peace returns.

§ 60. **Corporations.**—A corporation has, in general, only such powers as are conferred upon it by

the state or government creating it, and when it attempts to bind itself by contracts foreign to the objects for which it was formed, such contracts are usually void.[1]

Infants.

§ 61. **Who are infants.**—All persons, male and female, under the age of twenty-one years, are, by the common law, infants or minors. In most states the law so remains; but, in a few of them, females are of age at eighteen.

§ 62. **The general principle.**—A single principle threads the entire law touching the contracts of infants. Man attains his physical and mental development by slow growth, gaining the ability to cope with others in the preservation and protection of his property and interests only through long experience. He requires, and has a moral right to claim, during this period of growth, the special protection of the law, lest his ignorance, inexperience and improvidence place him at the mercy of others of maturer years. The law, therefore, as the most efficient means of protecting the infant, declares his contracts, with few exceptions, to be either void or voidable, and permits him to show his non-age as a defense to actions for the enforcement of his agreements, or sometimes as a reason why the courts should proceed actively to undo what he has improvidently done in performance of them.

Infancy, however, is a personal privilege, and an adult contracting with an infant is bound so long as the infant is in performance of his contract.

§ 63. **Binding acts and contracts for necessaries.**—Keeping in view, however, that the object of the law is to protect the infant, and not to oppress or injure him or others when justice to him does not require it, he is bound by his contracts for things with-

[1] *Post*, § 518, *et seq.*, where this matter is more fully discussed.

out which he could not live, or which are necessary to his health and ordinary comfort. Hence, he is bound to pay for necessaries, not what he has agreed to pay, but their reasonable value only.

§ 64. **What are necessaries.**—Food and clothing of a reasonable quantity, quality and kind, nursing and medical attendance in sickness, and a common school education at least, are necessaries. But a full college education is probably not a necessary, nor is a horse, or perhaps a bicycle, unless it is to be ridden for exercise under medical advice. The meaning of the term necessaries, however, is not restricted to the bare necessities of life, but extends to such things as are of undoubted utility in maintaining the infant properly according to his means and station in life. Articles of mere luxury and ornament, however, are always excluded, though luxurious articles of utility, such as rich clothing, may be necessaries, depending upon the wealth and social position of the infant. As an infant is not deemed sufficiently discreet to conduct business, his trading contracts, as for rent of a shop, or for clerk hire, are voidable.

Whatever may be the nature of the things supplied, they are never necessaries unless the infant has need of them, and if he has been otherwise sufficienty supplied, from whatever source, he is not liable.

§ 65. **Other binding acts and contracts—Property and earnings.**—There are other contracts by which an infant may be bound by reason of special provisions of law, not ordinarily of interest. Thus, under statute, he may be bound by a contract of apprenticeship.

An infant may, in general, take and hold property the same as an adult. But as his earnings belong to the father while the child lives with him, and payment to the child is usually no defense to a suit by the father.

§ 66. **Void and voidable contracts.**—It has sometimes been laid down that all contracts of a minor which are clearly to his detriment are absolutely void. Yet by the modern and prevailing view few if any of his contracts, not void for other cause, are more than voidable, and the infant may, upon reaching majority, ratify them if he chooses, whereupon he will be bound, or he may avoid them.

§ 67. **When may ratify or avoid.**—To ratify a contract requires the same capacity as to make one in the first place. Hence, one can not, while still an infant, ratify a contract voidable because of infancy. But he may avoid all his voidable contracts before he becomes of age, or immediately after, except that he can not, until he attains full age, avoid his deed of lands.

§ 68. **Must ratify all—Return of consideration.**—But one lately an infant can not ratify so much of his voidable contract as seems beneficial and avoid the rest. Thus, he can not avoid his promise to pay for property purchased and keep the property, nor avoid his purchase-money mortgage while he retains the mortgaged thing. But if one while still a minor has wasted, lost or squandered what he got under the contract, and can not therefore return it, he may still disaffirm.

Whether an infant who has bought property for cash may sue and recover his money may not be clear. But it has been held that he may, at least if he tender a return of his purchase, and even without such tender if return is impossible by reason of its loss or destruction.

§ 69. **Ratification — What constitutes.** — As to what constitutes a ratification the decisions are not at all points agreed. An express oral promise to pay, made by the minor after full age and with knowledge of his rights, is always sufficient, except in a few states where by statute the new promise must be in writing.

Apart from express ratification, such acts of the infant after full age as evince an intention to be bound, and which would give him an unjust advantage if he were not, will usually be deemed a ratification. Thus, if one, after full age, conveys away property purchased during infancy, or perhaps if he destroys it, or otherwise disposes of it, or in some cases unreasonably retains it, he will be held to have ratified his contract to pay for it.

§ 70. **Avoidance—What constitutes.**—Where the contract is wholly executory on both sides, the infant need not, independent of statute, take any active steps to disaffirm, but may, when sued, whether before or after full age, show as a complete defense, that he was an infant when the contract was made. Express words of disaffirmance, of course free the infant from liability, and so, likewise, of any act on his part, clearly evincing an intention not to be bound. Thus, if one has, while under age, conveyed his land to one party, but immediately upon reaching age conveyed it to another, the second deed was held to be an avoidance of the first. The effect of retaining the consideration upon the right to disaffirm must, of course, be kept in mind.

§ 71. **Torts.**—Ordinarily, an infant is liable for his torts, such as slander, assault, conversion and trespass, the same as an adult. But though fraud is a tort, it is generally held that an infant is not liable when he has, by falsely representing himself to be of age, induced another to enter into a contract with him.

Contracts of Insane Persons and Drunkards.

§ 72. **The general principle.**—In declaring void or voidable the contracts of persons of unsound or insufficient mind, the law proceeds upon the principle that it is the duty of civil society to protect against the wiles and rapacity of others those whose weakness

disables them from protecting themselves, and upon the further principle that those of insufficient mind can not assent in mind.

§ 73. **Insanity defined.**—Insanity for our purposes may be defined as such disease, weakness or other imperfection or derangement of mind as disables it, when entering into the form of a contract, to comprehend the subject of it, and its nature and probable consequence. Idiocy, so called, is within the definition.

§ 74. **Must affect assent.**—Unlike an infant, an insane person may have the capacity to do one binding act, though not another. Thus, a monomaniac on the subject of religion may make a binding contract, provided it is not dictated or produced by his malady. Still, if there is a delusion on a single subject, the person having it is as to such delusion, of unsound mind, and any contract which it prompts or produces is usually voidable.

§ 75. **Necessaries.**—But the lunatic or idiot is bound for the reasonable value of whatever necessaries are furnished him, for like reasons and in like manner with an infant. Necessaries for a lunatic are substantially the same as for an infant, except that they concern the estate and include whatever is needful for its preservation.

§ 76. **Insanity unknown—Lucid interval.**—And it is generally held that where one has dealt with a lunatic, in good faith, believing him to be sane, and no undue advantage has been taken, and the circumstances are such that the parties can not be returned to their original position, the contract must stand. In any case a person usually insane has the power of contract in a lucid interval. In like manner one ordinarily sane is incapacitated if insane at the time of contracting.

§ 77. **Voidable or void.**—A lunatic's contracts, except as above, are by most authorities, voidable merely. Hence, the lunatic, upon restoration to

reason, or his guardian or committee for him, and before he recovers mental health, may ratify or disaffirm at his or their election, subject upon disaffirmance to the obligation to return whatever of the consideration received is still in his or their possession. Statutes in all states provide for the judicial investigation of the mental condition of persons alleged to be insane and for placing them under guardianship if insanity is proved. When a guardian or committee is appointed for a person found to be insane, his deeds and contracts are utterly void, except they be for necessaries at reasonable prices. He can not bind himself then even in a lucid interval.

§ 78. **Drunkenness.**—Drunkenness and insanity are allied in nature and similar in legal effect, so far as their bearings upon civil as distinguished from criminal liability is concerned. Mere drunkenness is, ordinarily, no defense to a charge of crime; though permanent insanity caused by drunkenness is. In the law of contract, however, a drunken man is deemed temporarily insane.

Express contracts for non-necessaries entered into by one while in such state of drunkenness as to drown reason and judgment are voidable, whether the drunkenness was voluntary or due to the procurement of the other party. A man is liable, however, for the reasonable value of necessaries supplied to and consumed by him while drunk.

If the drunkard unreasonably retains, when sober, what he purchased while drunk, this will usually be a ratification or he may then ratify by express words.

Contracts and Property Rights of Married Women.

§ 79. **In general.**—While the law pertaining to marriage and the domestic relations is of great interest and importance in all of its phases, the im-

possibility of condensing it all within the limits of a few pages, will confine us to a passing glance at the property and contract rights of wives.

§ 80. **At common law.**—By the common law husband and wife were for most purposes regarded as one person, the legal existence of the wife was merged in that of the husband, as head of the family. She was under his cover and protection, and was therefore called *feme covert*, and her condition was known as *coverture*.

§ 81. **Marriage—Effect on wife's property.**—The wife's personal property, acquired before or during marriage, became at common law the husband's absolutely. To her choses in action, such as bills, notes, bonds and other debts, he had a qualified right which enabled him to reduce them into possession by receiving payment of them or compelling it by suit. But if the husband failed to exercise this right of appropriation during his life, her right to them revived.

By marriage the husband did not, even at common law, take the wife's real estate absolutely, but only an estate for life by virtue of which he became entitled to the rents and profits thereof during marriage.[1]

§ 82. **Wife's right in husband's property.**—The husband after marriage held his property substantially as before, except that it was encumbered by the wife's inchoate right of dower.[2]

§ 83. **Wife's contracts at law.**—So far as the power of married women to contract is concerned, they are worse off, by the common law, than infants; for, proceeding upon the theory that their legal existence is merged during coverture, their contracts are not merely voidable but absolutely void.

§ 84. **Her antenuptial contracts.**—The contracts of a woman bind her during her maidenhood practically as if she were a man. Upon her marriage, as

[1] *Post*, § 781.

[2] *Post*, § 782.

we have seen, their benefits inure to the husband at common law. But as the husband adopts the wife and her circumstances together, he must pay such debts as she owed at the time of marriage whether she brought him property or not.

§ 85. **The wife in equity.**—Courts of equity have long recognized and protected, as the separate estate of the wife, whatever property, real and personal, was settled upon her to her sole and separate use, treating whoever held the legal title as her trustee. While she had, in equity, no greater power of contract, independent of this separate property than at common law, yet she was generally permitted to dispose of it at pleasure, and to charge it with her engagements. The equitable estate of the wife is still recognized in most states, though it is less important since the enactment of the recent statutes about to be discussed.

§ 86. **The modern statutes.**—In all our states are statutes enlarging the rights and powers of married women with respect to property and contract. It must not be supposed, however, that they have swept away every vestige of the common law. The majority of these acts provide that all property owned by the wife at the time of the marriage, and all such also as she may acquire afterward by gift, grant, devise or bequest, shall be her separate estate, and not liable for the debts of her husband. Under these statutes the wife is sometimes given power to contract and to engage in trade quite generally as if sole, but under most of them she can contract *only with reference to her separate property*, or for the purpose of acquiring or preserving her separate estate, and contracts wholly unconnected with the acquirement, use, disposition, or enjoyment of her separate estate are still void as at common law. Since the married woman's statutes the duty of the husband to maintain his wife is usually about the same as before. Yet he is generally relieved of liability for her antenuptial debts.

CHAPTER VII.

CONTRACTS THAT MUST BE IN WRITING.

§ 87. **The statute of frauds.**—Prior to the statute of frauds most contracts and transactions could be lawfully proved by oral evidence. Such evidence, however, is open to very serious abuse. Witnesses may perjure themselves (swear falsely), they may forget, die, or remove from the jurisdiction of the court, and experience has shown that even honest witnesses may differ widely as to what was said or done, either from lapse of memory or because of wrong impressions gathered at the time. These reasons led to the enactment of the statute of frauds, which has been called, with abundant reason, the most important statute ever promulgated here or in the mother country, relating to civil affairs.[1]

In all our states are statutes framed upon the pattern of the English one. Yet they differ enough in detail, both from it and from each other, to make it necessary to take the local statute books for our guide. Here, however, we will take the exact words of the English statute.

§ 88. **Changes wrought by the statute.**—By the prior law nearly all contracts had the same effect when oral as when written. This statute selected from the great mass of contracts certain ones, and made writing essential to their proof, leaving the rest as they stood before. The matters to which the statute chiefly relates are:

1. The creation and transfer of certain estates or

[1] This statute (29 Car. 2, c. 3) was passed by the English parliament in 1676.

interests in lands, such as, at common law, could be created and transferred without deed or writing.[1]

2. Certain cases of contracts which, at common law, could be validly made by oral agreement. These last are provided for by what are known as the 4th and 17th sections of the statute.

§ 89. **The fourth section.**—The fourth section of the English statute is as follows:

"No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

§ 90. **Construction of this section.**—This section does not say that a verbal contract covered by its terms shall be illegal or void, but that no action shall be brought whereby to charge another upon it. It virtually leaves the parties free to perform if they wish to do so, but refuses to enforce performance if they do not, because of the lack of such evidence as the statute itself requires. If, therefore, the parties have done all that they agreed to do, neither can recover back or have performance set aside.

And one who has wholly or partly performed his part of an oral contract to which the statute applies may often recover what he has paid or the value of what he has done, particularly where the party seeking to recover is not himself in default, under the theory of a contract implied in law. But there are cases of admitted hardship where the statute may be pleaded by one party, leaving the other without relief.

§ 91. **The writing.**—The statute provides that the

[1] *Post*, §§ 789, 825.

agreement, or some memorandum or note thereof, be made in writing. If the contract itself be written, no note or memorandum need be made. But though the contract itself be oral, the subsequent execution of a sufficient memorandum renders it enforcible, provided the writing is made before suit. Even a signed letter addressed to a third person admitting the contract and stating its terms has been held to be binding.

The memorandum is sufficient, however informal, provided it affords complete written evidence of the whole agreement, and is signed within the meaning of the law. Thus, it may consist of letters, telegrams, or bills of parcels, provided all the terms of the contract appear.

§ 92. **The consideration.**—Construing the word "agreement" as broader than promise, and as including not only the promise but the consideration upon which it is made, it has been held that the memorandum was insufficient to satisfy the statute unless the consideration upon which the contract was made is expressed therein. But this doctrine is repudiated in some states, even where the word "agreement" is retained in the statute. But it is adhered to in others, and in a number of states the statute expressly requires the consideration to be expressed. Even where the consideration is required to be expressed, it is not necessary that it should be directly and precisely expressed. It is enough that any person of ordinary capacity would infer from the terms of the writing that such and no other was the consideration. The words "value received" are sufficient.

§ 93. **The signature.**—The memorandum must be signed by the party to be charged. If, therefore, the defendant has signed, it is not necessary that the plaintiff should have done the like. In some states the memorandum of a contract for the sale of land must be signed by the vendor, otherwise it is of no

avail. If so signed, the mere acceptance of the contract by the vendee is enough. The signing may be by agent.

Transactions Within the Statute.

§ 94. **Contracts for the sale of land.**—Land is such an important and valuable species of property that the framers of the English statute of frauds not only made a deed or conveyance in writing necessary to the creation and transfer of estates or interests in land, except leases for certain short terms, but they required also that every contract for the sale of lands or interests therein should be evidenced by writing.

These provisions have been adopted with more or less modification in nearly or quite all of our states.

§ 95. **To what interest it applies.**—The clause applies to every contract for the sale of either the legal or equitable title to lands themselves, and to the creation of rights of way or other easements. A permanent right to flow lands or to pass over them can be created only by writing.

Standing timber, growing grass and the fruit of trees, are generally regarded as interests in land, and, before being severed, can be validly sold only by writing. But it is generally held that growing crops, such as are produced by annual planting and cultivation, are to be regarded as mere chattels for purposes of sale separate from the land, and may be sold without writing.

§ 96. **Effect of part performance.**—If land has been actually conveyed pursuant to an oral bargain, the conveyance will stand and the seller may recover the price. If the price has been paid and the seller, in reliance upon the statute, refuses to convey, the buyer may recover his money upon a contract implied in law to repay it. But courts of equity occasionally go further and enforce specific performance of oral contracts to convey land where the buyer has

done such acts of part performance that it would be of fraud to deny him the remedy.

§ 97. **Promises to answer for the debt of another.**—Every special promise to answer for the debt, default or miscarriage of another must be in writing. This clause refers to what are technically known as contracts of guaranty and suretyship, and will therefore be discussed under that head.[1]

§ 98. **Promises in consideration of marriage.**—In view of the many loose expressions and conversations respecting property arrangements by parties and relatives where marriage is contemplated, the statute requires all promises in consideration of marriage to be in writing. Mutual promises to marry are not within the clause.

§ 99. **Contracts not to be performed within one year.**—Every contract that is not to be performed within one year from the making thereof must be in writing, or there must be a note or memorandum thereof having the requisites described above.

This clause applies only to such contracts as can not by their terms be fully performed within a year from the making thereof. The mere fact that the parties may not or do not perform, or even expect to perform with the year, does not render a writing necessary, provided such contract, as fairly and reasonably interpreted, admits of performance within the year, in accordance with its terms. And if a contract will be performed upon the happening of a contingency that may or may not occur within a year, it need not be in writing. Thus an agreement to support another during life, being fully performed if that other dies, is not within the statute, for the later may die within a year. But an oral agreement to employ one for more than a year, or for a year only, the service to begin on a day later than that upon which the contract is made, is void under the statute. So, of a contract to deliver goods

[1] *Post*, § 694.

or pay money in installments covering more than a year. But this clause does not, as a rule, prevent a recovery upon a contract implied in law, for goods furnished, money paid, or services rendered pursuant to the oral bargain.

§ 100. **The seventeenth section.**—The seventeenth section of the English statute enacts that

"No contract for the sale of any goods, wares and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good; except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

This is the basis of similar enactments in the majority of our states. Being applicable exclusively to sales of personal property, however, its further discussion will be postponed for that head.[1]

[1] *Post*, § 538.

CHAPTER VIII.

REALITY OF CONSENT.

Mistake.

§ 101. **In general.**—It is generally laid down that to form a binding contract the consent of the parties must be real; they must assent to the same thing, in the same sense. But this is not always strictly true, for the law is practical and deals chiefly with intention as outwardly manifested, and must often cast upon one party or the other some of the burdens resulting from misapprehension of the facts. Thus, if A offers B a certain price for wine under the impression that it is good, and B accepts the offer, A is bound, though the wine is not as good as he thought it was, provided B said or did nothing to mislead him. And this would usually be true, even though B knew of A's error and did nothing to correct it.[1] So, if one in terms offers certain goods for sale, having others in mind, he can not, as against one who has accepted the offer in good faith, rescind or avoid the contract thus formed.

§ 102. **Mistake of expression.**—Yet where both parties are fully agreed as to their respective rights and duties, but have, through mistake in reducing their agreement to writing, failed to express their real intention, courts of equity will usually correct the error, if it be clearly proved, provided the rights of innocent third parties would not be prejudiced.[2]

§ 103. **Mistake of intention.**—A man who sup-

[1] *Post*, § 115, *et seq.*
[2] *Post*, § 162.

poses himself to be contracting with A can not, without his consent, have thrust upon him a contract with B, for he is entitled to the credit and ability of the one with whom he believes himself to be dealing. Thus, where an order of goods was given to one party, and another who had succeeded him in business filled it, without notifying the ordering party of the change, it was held that the party filling the order could not recover the price, the goods having been consumed by the purchaser without notice of the facts.

If parties bargain for a specific chattel which at the time of the contract, but unknown to either, is non-existent, their contract is void, for it proceeds upon a mutual mistake of fact. And where A offered to sell B a horse for $165, and B understood $65, and accepted the offer on that basis, it was held that the contract was void on the ground of mistake. And if one pays and another receives a counterfeit bill or forged security, believing it genuine, no debt is created, nor is any debt paid by the transfer, and money paid therefor can ordinarily be recovered back. So, where one by mistake pays another more than is really due he may, unless such payment was by way of compromise, recover the excess, and where nothing was due all may be recovered.

§ 104. **Mistake of law.**—But if a contract is made, or money paid under mistake of law, such contract must stand, ordinarily, and the payment can not be recovered back, for every one is presumed to know the law, otherwise it is said there is no saying to what extent the excuse of ignorance might be carried.

Fraud Affecting the Consent.

§ 105. **Definition and nature.**—Fraud, as here used, may be defined as any spoken or acted falsehood whereby one is induced to enter into what is in

form a contract in the belief that it is a different thing from what it is, or that there exists for so doing some motive which does not in fact exist. It affects the assent, making that which is apparently real in fact unreal, and falls within the general principles governing mistake, duress, insanity, and some other things which prevent the free and intelligent action of the consenting mind.

§ 106. **Limits of the doctrine—Law-morals.**—In investigating this and other topics in the law, it must be remembered that the rules of law are not always the rules of strict morality, for in the practical administration of the law some allowance must be made for the weakness of human nature, and some duty rests upon parties to be vigilant in protecting their own interests.

§ 107. **What constitutes fraud.**—Fraud may consist either in the statement of what is false or in the suppression of what is true. The suppression of what is true is called concealment; the statement of what is false is misrepresentation. Most frauds being perpetrated by means of active misrepresentation, we will, so far as it is capable of separate treatment, discuss, first, fraud by misrepresentation.

§ 108. **Misrepresentation — Elements.** — When there is no relation of trust and confidence between the parties, misrepresentations must, in order to constitute fraud, be of the following sort and made under the following circumstances:

1. They must be of matters of fact and not of law.
2. Of matters of fact as distinguished from mere opinion.
3. Of matters existing at the time of the transaction or previously as distinguished from mere promises for the future.
4. Of matters material to the contract.
5. They must be relied upon by the party whose action they were intended to influence.

If all these elements be present and injury has en-

sued, all the consequences of fraud result, provided the party making the misrepresentation knew it to be false, or made it in reckless disregard of its truth or falsity, intending to mislead.

§ 109. **Law and fact—Fact and opinion.**—The law is administered upon the theory that every man is presumed to know the law. Hence, a misrepresentation of the legal effect of known facts does not, as a rule, constitute fraud, justifying the avoidance of a contract or giving rise to an action for damages.

A misrepresentation must, in order to constitute fraud, be of a matter of fact and not of mere opinion. So, if one party says that he thinks or believes so and so to be the case, this does not constitute fraud, for it is the duty of the other to inquire, and affords no grounds for avoidance, though the party speaking had a different opinion or actually knew the fact to be otherwise and intended to mislead.

§ 110. **Existing fact—Promise.**—Usually a mere promise for the future is not a fraud, though made with an intention to break it,[1] though such promise, when broken, may give rise to an action for damages, or justify a rescission.[2]

§ 111. **Must be material.**—The misrepresentation must be material in order to constitute fraud. In other words, it must be such as to render it improbable that the contract would have been entered into upon the terms in which it was made if the truth had been known.

§ 112. **Must be relied upon.**—If a party claiming to have been defrauded sees through the deception and knows the truth, or disregards it and acts upon his own judgment, he can not rescind his contract or recover damages on the ground of fraud. And where the means of knowledge were equally open to both parties, he who claims fraud will usually be

[1] Compare *post*, § 116.
[2] *Post*, § 581.

presumed to have had knowledge of what he might easily have known.

§ 113. **Puffing—Dealer's talk—Cost—Value.**—It is a common practice for a seller to praise his wares and for the buyer to depreciate them. If the subject-matter is equally open to the inspection of both parties, the law allows considerable latitude of statement, for it is presumed that each party takes the assertions of the other for what they are worth, and acts upon his own judgment, regarding them as mere matters of opinion, judgment or estimate, or else too transparent to be believed. Upon this ground, a false statement as to what one has been offered for property has been held not fraudulent, and so of statements of the cost or value of property offered for sale, though the contrary has sometimes been held, unless the seller holds himself out as in some sense an expert, and is so regarded by the purchaser, or a fiduciary relation exists between the parties.

§ 114. **Knowledge or belief of party defrauding—Innocent misrepresentations.**—In order to give rise to an action for deceit, which may exist independently of the mere right to rescind, the false representation must have been made, (1) with knowledge of its falsity, or (2) recklessly, by one having no knowledge either way, or (3) by one specially charged with the duty to know the facts. But though a statement innocently made by one who has reasonable grounds for his belief does not, though false, give rise to an action for deceit, it may sometimes afford ground for a rescission, or otherwise be similar in effect to fraud. Thus the positive affirmation of a material fact may amount to a warranty, or term in the contract, the breach of which will justify a rescission or give rise to an action for damages, or it may justify a court of equity in granting a rescission, or in refusing to grant specific performance to the party from whom the misstatement proceeded. But in certain classes of contracts, notably those of

insurance, an innocent misrepresentation of a material fact may be fatal even at law.

§ 115. **Concealment of material facts.**—The concealment of a material fact by one of the parties to a contract may amount to fraud, warranting a rescission or entitling the injured party to damages. Ordinarily, where no relationship of trust and confidence exists between the parties, neither party is bound to disclose to the other the existence of such facts as are equally open to both. But neither party will be permitted to do or say anything to prevent or disarm inquiry and examination by the other.

§ 116. **Same—Latent defects.**—A seller of goods is usually bound to disclose to the buyer such defects in them as are not patent and open to discovery by a person of ordinary caution and discernment. This doctrine is of frequent application in the cases of hidden diseases in animals. So one who sold fodder on which he knew poison had been spilled, without disclosing the fact, was held guilty of fraud.

A buyer on credit is not bound to disclose his financial condition unless inquiry is made by the seller, and his failure to do so is not fraud unless he buys with a pre-conceived design not to pay. But if he gives false information as to his credit or financial ability, whether inquiries are made or not, or buys with the positive intention never to pay at all, he is guilty of fraud.

§ 117. **Same—Fiduciary and confidential relations.**—If the parties stand in confidential relations to each other the duty of full disclosure is greater. Thus attorneys, agents, partners and others occupying a position of trust and confidence, must, in dealing with those by whom such confidence is reposed, make full and fair disclosure. And the same is true where the party failing to disclose knows that he is relied upon to make disclosure. Of this the contract of insurance is a familiar example.

§ 118. **Effect of fraud—Remedies.**—Fraud renders voidable at the option of the party injured every contract into which it enters as a moving cause. The party defrauded may, at his election, rescind it and decline to be bound, or he may affirm it. But if he elects to rescind he must return, or offer to return, promptly upon discovering the fraud, whatever he received under the contract, and may then recover whatever he parted with himself. If the defrauded party has parted with nothing, he may, if his rescission was in time, defend against an action brought to enforce performance by him. Finally he may let the contract stand and recover from the party defrauding such damages as were the result of the fraud. These are the remedies at law.

In equity the party may often have affirmative relief as: (1) By an action to compel the cancellation of an instrument procured by fraud, where its existence as an apparently valid obligation might work him injury, and to recover possession and enjoyment of his property. (2) By an action to have the instrument reformed so as to read as it should have read had no fraud been committed. (3) Sometimes by a pecuniary recovery.

§ 119. **Limits of right to rescind.**—The party rescinding must act promptly upon discovering the fraud. And a party defrauded into selling his property, real or personal, must exercise his right to rescind before the rights of honest purchasers for value have intervened. One who purchases innocently and for full value from a fraudulent vendee gets an absolute title.[1]

§ 120. **Same—Negotiable instrument.**—One who signs a negotiable instrument, being induced thereto by fraud, touching either its consideration or its contents, is not bound thereby unless it has in the mean-

[1] *Post*, § 535.

time, been transferred to a purchaser for value without notice of the wrong.[1]

Compulsion—Duress.

§ 121. **Definition and kinds.**—Duress has been defined as a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury. Many of the principles applicable to fraud apply, as they must in the nature of things, to duress, for, like fraud, it renders the seeming assent an empty form.

Duress is of two kinds. (1) Duress of imprisonment, which consists of the actual imprisonment or restraint of the person, whether in a prison, jail, or elsewhere, and (2) duress *per minas*, which consists in threats of imprisonment, or threats of violence or injury to the person, or sometimes to the property.

§ 122. **Party or near relative.**—Duress exists only where the threat or restraint is directed toward the party who promises in order to escape injury, or toward his or her parent, child, husband or wife

§ 123. **Duress by threats.**—Duress by threats must, like fraud, cause the contract. In other words, the threats must, in order to avoid a contract, be of such nature and made under such circumstances as to produce or cause the seeming assent. Mere threats to withhold money or to break a contract do not, ordinarily, constitute duress. Yet threats to unlawfully withhold or destroy the goods of another under circumstances of hardship or oppression is similar in effect to duress of the person. But the circumstances must be such that delay until resort to the remedies provided by law would result in serious or irreparable injury to the party complaining. Lawful compulsion is not duress, as, for instance, a

[1] More fully as to this see *post*, § 301.

mere threat to resort to lawful process for the recovery of a lawful claim.

§ 124. **Imprisonment.**—Lawful imprisonment is not duress, and a contract made, security given, or money paid to free one's self therefrom can not be avoided or recovered back upon that ground. But if the imprisonment is unlawful, the contrary is true. A threat of imprisonment by one having apparent power or authority to bring it about will amount to duress, for the law does not require one to resist paying until actually imprisoned.

§ 125. **Effect of duress.**—Money paid under duress can be recovered back, and whatever contract it produces is voidable, and may be rescinded and set aside in substantially the same manner and subject to practically the same limitations as in cases of fraud.

CHAPTER IX.

ILLEGAL CONTRACTS, OR CONTRACTS OF EVIL TENDENCY.

§ 126. **The general principle.**—Though competent parties may have agreed fully, fairly, in due form and upon adequate consideration, they may not be bound by their contract, for, if the making or performance of it would involve a violation of positive law, or destroy, or tend to destroy those interests which it is the policy of the law to foster and protect, it is void, as the law can not be invoked to defeat its own ends. If, therefore, one has paid money, delivered goods or conveyed land under an illegal agreement, the courts will, in general, leave him where he has placed himself, and he can recover neither the property nor its price.

§ 127. **Positive law and public policy.**—An agreement may be illegal either, (1) because it or its performance is violative of positive law, or, (2) because it is contrary to public policy. Thus, a contract to do what the law directly forbids, as to commit crime, is contrary to positive law and void. A contract never to marry is likewise void, not because contrary to positive law, but upon grounds of public policy; for though the law does not compel marriage, it encourages it as productive of public purity, individual happiness, and of the strength and perpetuity of the state. In either case the result is the same, for the invalidity of the contract follows as a matter of positive law.

§ 128. **Agreements contrary to positive law.**—Agreements contrary to positive law either violate statutes, or the express rules of the common law.

Thus, an agreement to commit a criminal act, whether it be declared such by express statute or by the rules of the common law, is illegal and void.

§ 129. **Statute—Penalty.**—If a statute directly forbids an act, a contract to do such an act is illegal whether the thing in question be wrong in itself or only wrong because prohibited. And though the statute does not in terms prohibit an act if it provides a penalty for doing it, this is usually deemed an implied prohibition, rendering a contract to do such act illegal and void.

Contracts Contrary to Positive Law.

§ 130. **Sunday contracts.**—The illegality of Sunday contracts both here and in England is the result of statues. These statutes are quite various. Some expressly declare Sunday contracts void. Others merely prohibit any manner of business, labor or work on the Sabbath, and the making of contracts being business, contracts made on that day are unlawful. But in some, "business and labor of one's ordinary occupation" is alone forbidden, and contracts not connected with such business or calling are legal. In all the states works of charity, necessity, or mercy, are permitted.

A promissory note, bond, deed or mortgage is valid though signed on Sunday if it appears that it was not delivered until a secular day, for such instruments do not take effect as contracts until delivery. And though the instrument is dated and signed on a secular day, if delivered on Sunday it is void, unless in the hands of a bona fide purchaser for value.

§ 131. **Gambling transactions.**—In England, wagering contracts have been from an early time, with some exceptions, enforced. With us, however, they are quite generally illegal and void, either by statutes or on grounds of public policy.

All business transactions involve, in some degree,

the elements of chance, and are not, for that reason, illegal. But where, in form, one party agrees to sell and deliver a commodity at a certain price on a future day and another to take and pay for it, if it appears that neither party intended that any goods should be actually delivered or accepted, but that there should be a settlement by the payment of "differences" merely, *i. e.*, the difference between the contract price and the market price on the day of delivery, such transaction is illegal and void as a mere bet or wager upon the rise or fall of the market. A note, bond or other security given in settlement of such differences is likewise void. But if one party contemplates an actual sale he may sue the other.

§ 132. **Unlawful contracts touching interest—Usury.**—Statutes in all of our states have prescribed a rate of interest which shall be awarded as damages, and which shall be taken to be contracted for where an agreement for interest specifies no rate. Further than this, statutes in nearly all of the states prohibit the taking, or contracting to take, interest in excess of a specified rate per cent., and interest contracted for or paid above that rate is called usury. The policy of usury laws is the protection of the debtor classes against the rapacity of creditors, and for the protection of the industrious and enterprising class against the mere holders of money. In England and in a few of our own states the usury laws have been repealed.

The usury laws differ considerably in the different states. In some the statute declares the entire contract void; in others the creditor forfeits all interest; in still others only the interest above the legal rate; and in some states one who has received illegal interest may be compelled to pay it back, or even to return double or treble the excess by way of penalty.

§ 133. **What contracts are usurious.**—Ordinarily, in order to constitute usury, there must be a loan, to

be returned at all events, and not a sale, and this rule applies to a sale or discount of bills and notes of third parties, as well as to a sale of any other property for a profit to the buyer exceeding the legal rate of interest.

§ 134. **Same—Discounts.**—The custom of merchants and bankers to deduct in advance the highest lawful rate of interest in discounting commercial paper is not a violation of the usury laws, though it gives them somewhat more than the legal rate of interest.

§ 135. **Same—Compound interest.**—An agreement to pay the highest legal rate of interest at stated intervals, with a stipulation that if any installment of such interest be not paid when due it shall itself bear interest, is not, according to most authorities, usurious. Some courts hold, however, that such agreements can be lawfully made only after a default in the payment of interest.

§ 136. **Same—Corrupt interest.**—In order to constitute usury there must be a corrupt intent to take more interest than the law allows. This does not mean that a party who does not know the law, and therefore takes unlawful interest, is guiltless; but that one, who, intending to take only lawful interest, by accident or mistake in computation takes more, is not liable to the consequences of usury, though he must refund the excess above the legal rate.

§ 137. **Same—Hazardous undertakings—Maritime loans.**—More than the legal rate may be taken where, from the nature of the transaction, both the principal and the interest are put at risk, as in the case of certain maritime loans.

§ 138. **Devices to cover usury.**—Under whatever device or cover a corrupt intent to take usury is hidden, the courts will, if they uncover it, visit the lender with the consequences of usury. Thus, where the borrower, in order to get the loan, is forced, in addition to the payment of lawful interest,

to purchase some worthless thing at a round price, or where the loan is made at lawful interest and a portion of it is at once received back by the lender, or the note given for the loan is dated back so as to cover up the taking of illegal interest for the real term of the loan, usury is committed.

Contracts Contrary to Public Policy.

§ 139. **Public policy defined.**—Public policy in the law does not admit of exact definition. It may be generally described, however, as that principle of law which holds that one can not lawfully do that which has a tendency to injure or destroy those interests which it is the policy of the law, for the public good, to foster and protect.

§ 140. **Contracts touching marriage relation.**—While the law compels no one to marry it encourages marriage and endeavors to preserve and keep pure and unbroken the marriage tie. Every contract, therefore, which places an unreasonable restraint upon the right to marry or the freedom of choice in marriage, is contrary to public policy and void. This is clearly true of a contract never to marry at all, or not to marry any one but a particular person, there being no engagement to marry that person. A contract not to marry until twenty-one would be reasonable and valid, and the same has been held of a contract not to marry without the consent of parents.

Any contract whereby one, for a consideration, agrees to negotiate or bring about a marriage between others, is absolutely void, because of the tendency of such agreements toward undue interference with freedom of choice in marriage.

§ 141. **Contracts in restraint of trade.**—Considerations of public welfare permeate the whole body of the law. Trade, commerce and the various useful callings are encouraged, and contracts that tend unreasonably to restrain persons from engaging in

any lawful business, profession or employment are contrary to public policy and void: (1) Because of their tendency to injure the parties making them, by diminishing their means of making a livelihood, and to deprive the public of their services along the line of what is, presumably, their greatest usefulness; and, (2) because of their tendency to enhance prices by creating monopoly in favor of the parties procuring such restraints.

§ 142. **Not every restraint unlawful — General rule.**—Yet not every restraint upon trade is unlawful. If one who had established a business and goodwill could not, upon a sale thereof, restrain himself within reasonable limits from competing with the purchaser, he could not get the full value of what his industry and enterprise had built up.

Though the rule itself may not, in all states, be quite so broad, it is established in most states, and will probably become established in all, that one may, without regard to any artificial limitations of space, such as state or national lines, restrain himself from carrying on some lawful trade, profession, business or calling, in favor of another who has purchased such business or calling, or has some legitimate conflicting interest to be protected, provided the restraint is no wider as to space than the fair and reasonable protection of the purchaser can possibly require.

And where the limitation as to space is no larger than the protection of the purchaser reasonably requires, no limitation as to time is necessary.

§ 143. **What limitation valid as to space.**—Under the modern view of public policy it may be stated that if the restraint is broader as to space than the reasonable protection of the purchaser can possibly require, such restraint is void, though it does not exceed the limits of a single city, town or county. If, on the other hand, the restraint be no broader than the protection of the party in whose favor it exists

reasonably requires in view of the nature and extent of the business or calling, and the modes in which it is carried on, such restraint is valid though it embraces or exceeds the limits of a single state, or perhaps the entire country. Thus, an agreement that one will never again carry on or be concerned in the business of an ironfounder is illegal and void, and so of an agreement by one who has sold his stock of goods and lease not to engage in business for five years. But an agreement by a lawyer who had sold his practice not to engage in the practice of law in the same city is valid. So if a merchant sells his stock and good-will, his agreement not to carry on business in the city where the business is located is valid, and so of an agreement not to carry on a publishing business in Michigan, or not to carry on the manufacture of matches except in Nevada and Montana, the business, in each case, extending over substantially all the territory to which the restraint applied.

§ 144. **Of the consideration.**—It has been laid down that contracts in restraint of trade must not only be reasonable, but that they must, contrary to the general rule, be upon a valuable consideration, even though under seal. But the consideration need not be adequate.

§ 145. **Cornering the market.**—A "corner," so-called, is a combination between capitalists to obtain control of a commodity and enhance its price by obtaining a monoply of the market. Such combinations are uniformly declared void where their true nature is disclosed, and an agreement to advance money or to do any other act in furtherance of such a purpose is void.

§ 146. **Combinations in fraud of public sales.**—Combinations between parties to bid at public sales, in order to stifle competition and obtain the property for less than it would otherwise bring are illegal and void, not only because they contemplate a fraud upon

the parties interested in the property as owners or creditors, but because, in many instances, they would thwart the most convenient method whereby courts make their decrees effective, that is, by public sale on execution or by receivers and the like. This does not prevent parties from combining in good faith in order to make a purchase of such magnitude as to make it impossible, impracticable or inexpedient for individuals to bid the property off. Where several contractors combine to stifle competition in bidding for a public work, their agreement is void. A contract thus procured is tainted with fraud upon the public treasury.

By bidding or puffing is the making of fictitious bids by persons employed by the owner. A buyer influenced by such a bid may usually rescind the contract for fraud.

Agreements Injurious to the Public Service.

§ 147. **Trafficking in public offices.**—Any contract to appoint one to public office, or involving the sale of a public or *quasi*-public office, or to do anything in consideration of the promisee exchanging office with, or securing office for, the promisor, or recommending him for such office, or resigning any office, or to do anything for the purpose of influencing an election to office, is void.

§ 148. **Compensation of public officers.**—And a contract to pay a public officer more than his lawful fee or compensation for rendering any service which he is bound by law to render is likewise void, both because it is without consideration, and because such contracts tend to encourage corrupt and illegal exactions on the part of the public servants, and partiality in the administration of public affairs.

The assignment by a public officer of his salary before it is due is generally held illegal and void,

because of its tendency to diminish his interest in the performance of his public duties.

§ 149. **Corrupting public officers—Lobbying contracts.**—A contract directly with a public officer to pay him any fee or reward as the price of official action is clearly illegal and void. While one may recover for services rendered pursuant to a contract to collect evidence to be used in presenting a claim to the legislature, or for appearing openly before it or its committees and presenting legitimate argument to influence legislative action, he can not recover where the contract contemplates the use of secret or private influence or corrupt and unlawful means.

§ 150. **Contracts affecting public justice.**—Among the contracts quite commonly declared void, as injuriously affecting the administration of public justice, are those savoring of champerty and maintenance. Maintenance has been defined as an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it. Champerty is maintenance aggravated by a bargain to have some part of the thing in dispute, or some profit out of it.

The law condemns maintenance and champerty in order to discourage litigation and encourage the amicable settlement of suits, and to bar out doubtful claims. But it has been held in some states that the reasons of the old law now apply with but little force, and the common law doctrines as to maintenance and champerty have been much modified. Usually an attorney acting in good faith may lawfully agree for a reasonable compensation out of the money or property recovered, to be paid in case of success.

Any agreement intended or calculated to induce the commission of perjury is void. So every agreement to compound, stifle, or suppress a criminal prosecution for felony or for a misdemeanor of a public nature, can not form a valid consideration for a contract, and every contract based thereon is

absolutely void. But a contract for the mere purpose of securing payment or restoration or indemnity to the party injured in person or property by the commission of a public offense is valid, provided it is not coupled with an agreement not to prosecute for the public wrong.

Contracts and Conveyances in Fraud of Creditors.

§ 151. **In general.**—The right of ownership carries with it, in general, the right to do as one pleases with his own, so long as he does not interfere with the existing rights of others. But even where a creditor takes no specific security upon the debtor's property, as by pledge or mortgage, he is nevertheless entitled, within certain limits, to demand that the debtor shall not diminish it to his prejudice, for he has trusted in the confidence that he will not. By the general policy of both our common and statute law, therefore, conveyances made with intent to hinder, delay or defraud creditors, are, as to the creditors so hindered, delayed or defrauded, void.

§ 152. **The property.**—A man's services, or those of his family, are not property in the sense that he or they will be compelled to labor to pay his debts, however just. Neither can there be a fraudulent conveyance of a homestead or other exempt property.

§ 153. **The intent—Gift.**—To render a conveyance fraudulent and void as to creditors there must be an intent to hinder, delay or defraud them. But even where the property of a debtor is conveyed by him with such intent the purchaser will hold it as against the creditors of the grantor or seller, provided:

(1) He purchased it bona fide, without notice or knowledge of the fraudulent intent, and

(2) That he paid value for what he got before acquiring notice or knowledge of the fraudulent intent.

On the other hand, if the buyer purchased with knowledge of the debtor's fraudulent purpose, creditors may impeach the transfer and get at least so much of the property as will satisfy their debts, even though the buyer paid full value for it.

One must be just before he is generous. Hence, if a person in debt conveys away his property without consideration, by way of gift, the donee or recipient gets a right inferior to that of creditors, provided the debtor who made the gift was rendered insolvent or his ability to pay just debts was materially impaired; and this would be so, though neither the giver or receiver actually intended to defraud. This rule applies to gifts between husband and wife.

§ 154. **The evidence.**—Where the conveyance is purely voluntary (without *valuable* consideration) and leaves the debtor insolvent, fraud will be conclusively presumed. In other cases the declarations of the parties may convince of their fraudulent intent, or the evidence may be circumstantial, or by proof of facts calculated to throw suspicion on the transaction, as by false recitals of consideration, or where the debtor immediately absconds after conveying all he owns, or where the price paid is ridiculously small, or where the transfer was made pending suit and the like.

§ 155. **Preferences.**—But the fact that one is indebted does not prevent him from paying one just debt in full, though he is left without means to pay others equally just. But bankruptcy and insolvency laws commonly provide otherwise, and when the debtor and his property are brought within the operation of these laws, a ratable distribution among his several creditors is compelled.

§ 156. **Composition with creditors.**—Where two or more creditors of the same debtor by mutual agreement accept a part of their debts in satisfaction of the whole, this is a complete discharge. But any secret advantage secured by one creditor over the others,

with the assent of the debtor, is a fraud on the other creditors and renders the settlement void as to them, and they may recover the full amount of their debts.[1]

§ 157. **Fraudulent conveyance valid between the parties.**—The general rule appears to be that a completed conveyance, though made with the intent to hinder, delay, or defraud creditors, is valid as between the parties, being void or voidable only as to the creditors so hindered, etc. While the fraudulent contract is wholly executory, it will not be enforced, nor can a vendor, by many authorities, recover the price of property fraudulently conveyed.

[1] *Post*, § 266.

CHAPTER X.

INTERPRETATION OF CONTRACTS.

Evidence.

Having examined into the nature and formation of a contract, it remains to be seen how and by what means the contract must be proved, and by what rules its language is interpreted and its meaning ascertained when the meaning is doubtful or in dispute.

§ 158. **When contract written.**—Whenever the parties to a contract have actually reduced it to writing, whether it be such as could have been validly made without writing or not, the writing is the best evidence of their agreement, and parol evidence on the testimony of witnesses as to their oral bargainings can not be received to add to, vary, or contradict it. The reason of this is, that what the parties have deliberately written may reasonably be supposed to be the final expression of their intention, and it may be safely assumed that whatever was previously said between them was intended to be merged or swallowed up in the written agreement.

§ 159. **Writing not intended as a contract or incomplete.**—But a mere written memorandum not intended to have effect as a contract or grant may be varied by oral evidence. Thus, so far as a writing is a mere receipt, it may be contradicted or controlled by the testimony of witnesses, but so far as it is a contract, it can not. Where it appears from the writing itself that it contains only part of the agree-

ment, parol evidence will be admitted to prove the rest.

§ 160. **To show invalidity of contract—Condition precedent.**—Parol evidence is freely admitted to prove that by reason of illegality, fraud and the like, a written contract is invalid or should be reformed. So, it may be orally shown that it was never delivered, or that it was only to bind the parties upon the happening of some event or performance of some act constituting a condition precedent.

§ 161. **To show discharge—Subsequent oral agreements.**—As a general rule, any subsequent oral agreement by which a pre-existing simple contract in writing is waived, rescinded, or modified, may be proved, unless such subsequent agreement be void under the statute of frauds or otherwise by the general rules of law. Performance of *any* contract may be orally proved.

§ 162. **To show mistake.**—And when, by mistake in reducing a contract to writing, it fails to express the actual agreement of the parties, by using or omitting terms which they did not intend to insert or omit, oral evidence will be admitted in equity to show what the true contract was.

§ 163. **Explaining terms.**—There is an obvious distinction between explaining what is written and contradicting it. Parol evidence will be admitted to explain abbreviations, obscure or foreign words, and to show the parties or the subject-matter intended to be described. Parol evidence will be admitted to show the circumstances under which a contract was made, and the situation of the parties thereto in aid of its interpretation.

§ 164. **Usage and custom.**—Custom is sometimes used in the sense of a rule of law, founded upon general usage and common consent. In this sense, custom is the source and basis of the common law itself. But the terms usage and custom are used interchangeably to describe a course or mode of

dealing so generally adopted and followed in a particular place or by persons engaged in a particular trade or vocation, that the parties may be supposed to have contracted with reference to it. Of custom in the sense of common law, the courts take notice without proof, but of usage or custom in the sense of a mere habit or way of dealing, they usually require proof. Evidence of usage will be received by the courts:

(1) To explain the meaning of some word or phrase contained in a written contract.

(2) To annex thereto a term not expressed.

§ 165. **Usage to explain terms.**—Many words and phrases have, by usage among merchants, acquired a meaning different from what they have among people generally, and there are other words and phrases which have in like manner acquired a peculiar or technical meaning in certain trades, professions or employments. Now, if we are to rightly interpret these words and phrases, we must read them, as a rule, not in their common or usual sense, but in the technical or peculiar sense that usage has given them, for it was in that sense that the parties employed and understood them. Parol evidence is therefore admissible to show the meaning which, by custom, the words of a contract have acquired. Thus, where a party contracted to deliver "good custom cowhide shoes," parol evidence was admitted to show what was meant by that term, to show what was meant by "barrels" in a contract for petroleum, and to show that the term "bale" meant a pressed bale of a given weight.

§ 166. **Usage may annex term unexpressed.**—Parties often fail to write all the terms of their agreement, leaving to implication those things which uniform and well-established usage would annex to their bargain. Thus, in the contract for the delivery of a large quantity of barley, parol evidence was admitted,

where the contract was silent as to the mode of delivery, to show that it was the custom of trade to deliver it in sacks.

§ 167. **Knowledge of usage.**—Evidence of a usage to control the interpretation of a contract, or annex a term thereto, is admitted because the parties are presumed to have intended that it should form a part of their bargain. A usage, therefore, to affect the contract, must have been actually or presumptively known to the parties. But when a usage has existed in a particular trade or locality for a considerable time, knowledge of it upon the part of those engaged in that trade, or doing business in that locality, will usually be presumed.

Rules of Interpretation.

§ 168. **Necessity for interpretation—The cardinal rule.**—The necessity for interpretation arises not only from the imperfection and inadequacy of language as an instrument of communication between mind and mind, but from the fact that it is often carelessly, ignorantly or unskillfully employed. The cardinal rule of construction in the law of contracts is that the intention of the parties is to be inquired into and ascertained if possible. This is the end and aim of interpretation itself.

§ 169. **How words understood.**—Commonly, words are to be construed in their plain, ordinary or usual sense, unless from the context or from surrounding facts and circumstances they appear to have been used in a special, peculiar or technical sense.

§ 170. **The whole writing.**—The whole writing should be construed together, as the true meaning of one word, sentence or paragraph may be made clear by other parts of the same instrument. Agreements made at the same time between the same parties with respect to the same transaction will be construed together though contained in different papers. And

where the contract or instrument under consideration refers expressly to another paper clearly intended as an inducement to the contract, the latter paper may be resorted to in explanation of the first.

§ 171. **Partly written and partly printed.**—Printed blanks are used in business and conveyancing to be filled in as the parties may desire. If the written and printed parts of a contract clearly conflict, the writing will control the printing.

§ 172. **Words construed most strongly against party using them.**—The words of a contract are construed in cases of doubt most strongly against the party using them, for he may be presumed to look after his own interests, and ought to be held to a strict interpretation of the words he has himself chosen.

§ 173. **Construction by parties.**—The construction which the parties have by acts subsequent to the making of a contract placed upon it will, unless it be contrary to the plain import of its language or to the rules of law, be entitled to great if not controlling influence.

§ 174. **Repugnant clauses.**—In construing contracts courts endeavor to give effect to every word and clause and to reconcile apparently repugnant and inconsistent clauses. But when this attempt has proved fruitless, that will be rejected which, if retained, would be meaningless or would be at war with the manifest intention and purpose of the parties as gathered from the whole instrument.

CHAPTER XI.

DISCHARGE OF CONTRACT BY AGREEMENT AND BY PERFORMANCE.

Having learned how contracts are formed and interpreted, it now remains to be seen how a valid contract may be discharged and the parties to it freed from the rights and duties which it created and imposed.

Discharge by Agreement.

§ 175. **Simple contracts.**—While a simple contract is wholly executory and nothing has been performed under it upon either side, it may be discharged by the agreement of the parties thereto that neither shall be any longer bound. This is termed waiver, cancellation or rescission. And such rescission may be implied from conduct, as where both parties are in default, or mutually abandon performance.

But when one party to a contract has performed his part, his mere agreement to discharge the other without payment or performance, is without consideration, and is void unless there be a release under seal.[1]

If an existing contract is, by mutual consent, subsequently altered in any of its terms, there arises a new contract consisting of what remains of the old one and whatever new stipulations are added, and the old contract is, at least, so for as changed, rescinded and discharged, even though no express words of rescission are employed.

[1] *Post*, §§ 246, 249.

§ 176. **Same—Sealed contracts.**—A sealed contract may be rescinded by an agreement that it shall be no longer in force, and an obliteration of the seal, or the delivery of the writing over to the party bound. A mere unsealed agreement to rescind a sealed contract is not enough. But if a simple contract is so far executed that it would be inequitable and unjust to enforce a prior sealed one for which it was substituted, this will discharge such sealed contract, at least in equity.

As land can be conveyed only by deed since the statute of frauds, the mere destruction of a deed with intent to revest the title in the grantor is not enough. There must be a reconveyance.

§ 177. **Novation.**—A contract may be rescinded by the mutual agreement of the parties thereto and a third person, that one of them shall be released and such third party shall be bound in his place, the terms of the contract remaining the same. This is called novation.

§ 178. **By reason of term in the contract.**—The contract may provide that one of the parties may terminate it upon giving a certain specified notice to the other that he has elected to do so. Thus, it is often stipulated in contracts of service that the master or servant may terminate a hiring for a year, or some other fixed period, upon giving a week's or month's notice of his election to do so.

Discharge by Performance.

§ 179. **General rule.**—The complete performance of all the stipulations of a contract binding one of the parties thereto discharges him from all liability thereon, though the other party may still be bound, as far as any stipulations upon his part are concerned. But nothing less than full performance strictly according to the terms of the contract will, at common law, discharge it. Thus, a contract for

the sale of personal property is performed only by the delivery of the precise quantity specified at the time and place and in the mode agreed upon. So, if a party contracts to serve a year for a specified sum, he is liable if he leaves without legal excuse before the year is out, and he can not, according to the weight of authority, recover for what he has done.[1]

§ 180. **In equity.**—In equity, however, where a contract has been substantially performed in good faith, the party performing may recover as for a complete performance less whatever damages the other may have suffered on account of his partial default. This rule is of frequent application in contracts for the erection of buildings. If the contractor in good faith attempts to perform, and does so substantially, he may recover in spite of slight and trivial defects, for which compensation can be made by allowance to the other party. But the failure to perform must not be substantial or willful or due to bad faith.

§ 181. **Time of performance.**—Time, at law, is said to be of the essence of the contract, and one who is in default in performing his undertaking strictly at the time agreed upon, is guilty of a breach and is liable for damages for non-performance, and the other party is usually released from liability to accept and pay for performance or to perform on his part. And this must necessarily be so in most mercantile contracts, both at law and in equity. Yet if a party voluntarily receives performance after the time stipulated, he will be bound to make compensation therefor, with a deduction of damages for the delay.

§ 182. **Where no express agreement as to time.**—Usually, if no time is specified for the performance of a contract, the law allows a reasonable time. What is a reasonable time depends upon the facts and circumstances of the particular case. But a

[1] *Post*, § 386.

promissory note or other written contract for the payment of money which contains no stipulation as to the time of payment, is due on demand.[1] This means immediately, without any demand in fact, suit being itself a sufficient demand, and the same is true where the contract contains the words "on demand."

§ 183. **Express provision as to time.**—Express provisions as to time are construed by the courts in the same way, ordinarily, as by intelligent persons generally. Thus, the word month is usually construed as meaning a calendar month, and the word year as twelve calendar months, so that a contract to do an act or pay money one year, or month, from date, must be performed on the corresponding date of the following year or month. But the construction may be otherwise varied by the presumed intention of the parties as gathered from the whole contract and the circumstances of the case.

Usually, fractions of a day are not noticed in the computation of time, and hence the day of the date of the contract is commonly excluded. If a contract is to be performed within thirty days from May 1, performance would be due on the 31st.

The word "until" commonly excludes the date to which it refers, so that a lease until June 1 would expire on May 31, though the plain intent in the particular instance will be heeded. A contract to do an act between two days commonly excludes both.

Usually, where the last day of performance falls on Sunday, that day is excluded and performance is due on Monday. But where, as in the case of bills and notes, days of grace are allowed (a matter elsewhere explained), payment is due on Saturday.[2]

[1] *Post*, § 239.
[2] *Post*, § 325.

Payment.

§ 184. **Definition.**—Payment includes whatever delivery, assignment, or transfer of money, property, or rights, is made and accepted in discharge of a debt.

§ 185. **Right to money.**—One to whom a debt is due in money is entitled to money, and is under no obligation to receive a bill, note, or check, or to take goods or services in discharge thereof. If he voluntarily accepts something else in discharge of the debt, however, it is extinguished. But he may insist on money, and that kind of money which the law has made legal tender, and refuse all else,[1] unless the debt is payable in current funds, when he is bound to receive whatever passes current as money at its face value at the place where the debt is due.[2]

§ 186. **Counterfeit money.**—Payment in counterfeit money is a mere nullity. It can neither create or extinguish a debt. But in order to entitle the creditor who has received counterfeits to recover good payment, he must, if the debtor was innocent, return them promptly upon discovering their worthlessness. Substantially the same rules apply to payment in forged securities.[3]

§ 187. **Part payment.**—The acceptance by the creditor of a less sum than is admitted to be due, under an agreement that the whole debt shall be discharged, is void on the ground that there is no consideration for the release of the balance.[4] A creditor is not bound to receive a part of his debt where all is due, but may reject it and sue for the whole.

§ 188. **Payment by bill or note.**—Where the debtor gives his own note or bill or that of a third party it is frequently a question whether this dis-

[1] *Post*, § 200.

[2] Some authorities, however, regard the phrase "current funds" as meaning gold and silver only.

[3] *Post*, § 290.

[4] *Post*, §§ 246, 247.

charges the debt. If it amounts to absolute payment, the debt for which it was given is discharged together with all liens and collateral securities therefor; otherwise, upon the dishonor of the paper, the creditor may resort to the original debt and may make use of the liens and securities for its collection.

§ 189. **Debtor's own note or bill.**—The debtor's own note or bill, given on account of a debt, whether contracted previously or at the time, is not payment, unless it is itself paid, or unless it was given and received under the express understanding that it should be absolute payment. It operates merely as a bargain for credit, suspending the right of action on the original debt or claim until the maturity of the paper, when the creditor may, unless he has indorsed the paper away so as to be unable to return it at the trial, sue upon the consideration for which it was originally given.

§ 190. **Bill or note of third party.**—When a valid bill or note of a third party is given and received under an agreement that it shall be absolute payment of a debt, it will be a complete discharge, whether the debt was pre-existing or was contracted at the time. In the absence of such agreement, however, the note or bill is usually regarded as a conditional payment or collateral security, and the creditor may, unless he has been guilty of some negligence injurious to the debtor, or has negotiated it away, return it if it is dishonored at maturity, and sue for the original debt.

If, at the time a debt is contracted, the creditor takes from the debtor the negotiable bill or note of a third party unindorsed, or indorsed without recourse, it is prima facie payment of the debt, being regarded as a sale or barter of the note or bill for the consideration giving rise to the debt.

§ 191. **Payment by post.**—Money sent by post is at the risk of the debtor unless it is so transmitted by the express or implied authority of the creditor,

and in the manner and with the precautions specified by him. But when so sent the remittance is at the risk of the creditor and the debt is paid, though the money never reaches his hands.

§ 192. **Proof of payment.**—The burden of proving payment is usually upon the defendant, and it may be shown by either written or oral evidence. The most common evidence of payment is a written admission of the debtor called a receipt. But though the production of a receipt by the debtor raises a presumption of payment which the creditor must overcome, he may overcome it even by oral evidence.

A presumption of payment arises where a bill of exchange or promissory note is found in the hands of the drawee or maker. But this presumption may likewise be overcome.[1]

§ 193. **Application of payments.**—Where one who owes several debts to the same creditor makes a partial payment it often becomes important to know what debt is to be deemed extinguished, together with its securities, and what debt, with its securities, is still deemed to subsist.

§ 194. **By the parties.**—The debtor has a right, in the first place, to say absolutely to which debt a voluntary payment is to be applied, and if the creditor receives the money with notice of such application he can not afterward, without the debtor's assent, apply it to some other debt.

If the debtor fails to direct to which debt the payment shall apply, the creditor may, ordinarily, with sole reference to his own interests, apply it as he sees fit. But he can not apply the payment to a debt not yet due, nor to one arising after payment, nor to a contested or illegal claim.

§ 195. **By the law.**—When neither party has made any application of the payment, the court will apply it as the justice and equity of the case may

[1] As to the presumption of payment arising from lapse of time, see *post*, § 254.

require. But the court will apply a payment only where the parties have neglected to do so, and the intention to apply a payment to a particular debt may be implied as well as expressed. Thus, where the payment is exactly equal to one debt and not to another, it may be properly inferred that the debtor intended to pay the former and not the latter.

Commonly, a general payment will be applied to interest first, and then to principal; to an older debt in preference to a later one; to a debt legally enforcible rather than to one not enforcible; to one liquidated and certain rather than to one unliquidated and uncertain.

§ 196. **Set-off, recoupment, etc.**—Analogous to some extent to the defense of payment are "set-off" and "recoupment," by means of which, in modern practice, a party sued may balance off his own demands against the demands of the plaintiff and suffer judgment for the difference only.

If the counter claim set up arises out of a transaction independent of the plaintiff's cause of action, as where the plaintiff sues for the price of goods sold to the defendant, and the defendant sets up a debt created in his own favor by money previously loaned by him to the plaintiff, the term set-off is applied. If the counter claim grows out of the same transaction, as where there was a breach of a warranty in the sale of the horse for which the defendant claims a deduction, when sued for the price, the term recoupment is used.

Tender.

§ 197. **Defined.**—Tender is an offer to perform some act which the party offering is bound by contract or otherwise to perform. It may be (1) an offer to pay money, (2) to deliver goods, render services, or to do some other act.

§ 198. **In general—Its effect.**—One who is bound

by contract to deliver goods or render services is usually released from his obligation where he has offered the goods or the services in accordance with the contract and they have been refused. He is then entitled to sue for breach of the contract, or to defend a suit for non-performance. But where the performance due consists in the payment of money, a tender by the debtor, though in strict accordance with the terms of the contract, does not discharge the debt. Its effect may be, and usually is:

(1) To stop the accrual of interest from the date of the tender.

(2) To throw upon the creditor the costs of a suit brought for the recovery of the debt.

(3) To discharge whatever pledge, mortgage, or other security has been given for the debt.

§ 199. **Requisites of a valid tender—Keeping tender good.**—In order to stop interest and cast the costs of suit upon the creditor, the debtor must not only offer to pay, but must be always ready and willing to pay. If the creditor subsequently demands payment, and the debtor refuses it, the previous offer to pay is of no effect. If an action is brought, and the defendant relies upon the tender, he must set it up in his pleadings and pay the money into court.

§ 200. **In what money—Amount.**—A tender to be valid must be in money which the law makes a legal tender. In this country the power to declare what shall be legal tender in payment of debts resides in the congress of the United States. Under the laws of congress gold coins and silver dollars of the United States and United States treasury notes are a legal tender to any amount. Silver coins less than $1 are a legal tender up to $10; copper and nickel coins up to 25 cents. Bank notes are not a legal tender, but such notes are a good tender unless they are objected to on the ground that they are not a legal tender, provided the tender is in other respects sufficient.

A tender of less than is due is of no effect unless

accepted, when it amounts, of course, to a payment *pro tanto*. But the exact amount need not be tendered if the creditor can take the debt from what is offered without making change.

§ 201. **Must be unconditional.**—A tender to be effectual must be unconditional. Thus, a tender on condition that the creditor shall give a receipt in full, or a release of all demands, is without effect. But it is generally held that the fact that the tender is accompanied by a demand that property pledged to the creditor as security shall be delivered up does not make the tender invalid. And one who pays a negotiable instrument has a right to demand that it be delivered up to him. The demand of a receipt has been held to make the tender conditional, and hence ineffectual; but there is high authority in favor of the debtor's right to a receipt for the precise sum paid.

§ 202. **Money must be produced.**—Ordinarily the money must be actually produced. Its actual production will be waived, however, where the creditor expressly declares that he will not receive it, even if tendered, or prevents actual tender by running away.

§ 203. **Place and time of tender.**—If no particular place of payment is agreed upon, it is the duty of the debtor to seek the creditor, if he is within the state. But if a place of payment is specified by the contract, it is the duty of the creditor to be there, in person or by agent, and if the debtor has the money there at the time it is due, the tender is sufficient, though there is no one there to take it.

A tender, whether of money or goods, must be made, as a rule, on the precise day when performance is due.

§ 204. **Effect upon liens.**—A tender at maturity of the full amount of a debt secured by pledge or mortgage destroys the lien thereof, and this doctrine is extended, usually, to liens of every kind. So, ac-

cording to many authorities, the tender has this effect even if made after default.

§ 205. **Waiver of defects.**—If the thing tendered is actually received it will amount, under varying circumstances, to payment in full, or to part payment, or to accord and satisfaction. And if the creditor bases his refusal to take the money on some specific ground, he can not afterwards claim that the tender was insufficient for some other reason.

CHAPTER XII.

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.

§ 206. **General rule.**—The general rule is that mere impossibility of performance arising subsequent to the contract does not discharge it, even though the promisor was wholly without fault, and he must pay damages notwithstanding this impossibility, unless his contract provided that its occurrence should work a discharge. Thus, if one has agreed to complete a house by a certain day, he must pay damages for his failure to do so, though his default was made necessary by its being blown down or burned by lightning, without his fault, so near the time of performance that he could not possibly complete it by the appointed date. Neither, in such case, may the promisor recover for what he has done, for it is said that he might, by the terms of his contract, have protected himself against such contingencies. In accordance with the same principle it is held that where one has contracted to deliver goods by a certain day, he is bound to do so or pay damages though no such goods can be procured in market, or only at ruinous prices, or he is prevented from getting them to the buyer because the road is impassable.[1]

§ 207. **Exceptions—Continued existence of person or thing—Act of God.**—But where the contract from its nature can clearly be said to be made upon the implied condition of the continued existence or capacity of some certain person or the continued existence

[1] Compare *ante*, § 44.

of some thing, then the destruction of such thing, or the death or incapacity of such person, discharges it. Thus, in contracts for personal service, the continued existence of the servant and his capacity to serve is a condition of the contract, which will be discharged by his death or incapacitating illness.[1]

So, if parties bargain for the future sale and delivery of a specific chattel, which is destroyed without the fault of the promisor before the time of performance arrives, the contract is discharged as to both. The same principle was applied where a hall was let for a series of concerts, and before the time for performance it was destroyed by fire.

Where a party by his own contract has laid a charge or duty upon himself, subsequent impossibility of performance does not, as a rule, excuse performance, except as stated above. But where the *law* lays a charge or duty upon a person, it is said that the act of God rendering performance impossible is a discharge. This exception, if it be one, is illustrated by a common carrier of goods, who, unless he has absolutely warranted their safe delivery, is excused if they are lost, damaged or delayed by the act of God or the public enemy.[2]

[1] *Post*, § 210.
[2] *Post*, § 661 *et seq.*

CHAPTER XIII.

DISCHARGE BY OPERATION OF LAW.

§ 208. **By judgment—Merger.**—Where a party has sued and recovered a judgment for the breach of a contract, sealed or simple, the judgment, being of higher dignity than the contract itself, merges the contract or cause of action and thus discharges it. Judgment against the plaintiff discharges his cause of action, as the books say, by way of estoppel.

If the parties to a simple contract enter into a sealed contract upon the same matter, the prior simple contract is merged in the sealed one and thus discharged, unless the sealed contract was intended as a mere collateral security.

§ 209. **By bankruptcy.**—The federal constitution gives congress power to establish uniform laws on the subject of bankruptcies. The object of such laws is to secure the equitable distribution of insolvent estates among creditors, and to relieve honest but unfortunate debtors from the burden of debts by which they might be prevented from caring for themselves and families, and from building up enterprises useful to the community. The subject of bankruptcy is now regulated by an act of congress, approved July 1, 1898, the effect of which is to suspend, until its repeal, the operation of similar laws made by the states. A valid discharge under this law affords a complete defense to the creditor to suits for debts affected by the discharge.

§ 210. **By death.**—Ordinary contracts for the payment of money merely are not discharged by the death of either party. The personal representatives of the

debtor are bound to pay as far as they have coming to them from the deceased assets properly applicable under the law to the discharge of debts, and the representatives of a deceased creditor may sue and recover a debt due him, provided it is due upon a consideration which has been executed by them or by the deceased. But wherever the contract in question involves personal skill and taste, or personal trust and confidence between the parties, the death of one of them discharges it. This would be so of a contract to paint a picture or write a book, or a contract of ordinary partnership, or for personal services. But the rule does not apply to contracts for the performance of what can be as well done by one person as another, as to build a house or paint a barn. In such cases the representatives of the deceased contractor may perform and recover therefor, and the estate is liable for their non-performance. But when a contract for personal services is discharged by the death of either master or servant, the servant, if he survives, or his representatives, if he be dead, may usually recover the reasonable value of what was done before death terminated the contract.

Alteration of Written Contract.

§ 211. **Definition.**—An alteration of a written instrument is some addition or erasure by which its meaning or language is changed. Alterations made before the execution of an instrument are presumptively assented to, and hence do not destroy its validity. And parties to a written contract may afterward, by mutual consent, change it as they please.

§ 212. **Alteration by party or by stranger.**—But generally, if one who is entitled under a written executory contract, willfully alters it or procures or assents to its alteration in a material part, without authority from the other party, such contract is discharged at the option of the latter.

Altering by a stranger, without the knowledge or consent of the party seeking enforcement, is called spoliation, and does not avoid the contract if its original terms can be ascertained by evidence.

§ 213. **Material and immaterial alterations.**—An alteration, in order to avoid a contract, must be material. If immaterial, it will not, by the weight of authority, have that effect, even though made with fraudulent intent.

If what is added to or erased from a written contract would cause it to operate differently in point of law from what it did before, provided it could still be enforced, the alteration is material, otherwise not. Thus, increasing the principal, adding interest or increasing the rate, changing the date, changing the time or place of payment, adding or altering words of negotiability, are material alterations. And it seems that a material alteration is fatal, whether it be prejudicial to the party against whom the contract is sought to be enforced or not.

If, on the other hand, an instrument would operate precisely the same in law after alteration as before, the alteration is immaterial, and will not avoid it unless, according to a few authorities, a fraud were meant. To add words expressing what the law already implies is an immaterial alteration as, by adding to a note specifying no time of payment the words, "on demand," for such a note is so payable by law.

§ 214. **Correcting mistakes.**—Courts have sometimes permitted writings to stand which have been altered to correspond with an intention which the parties by mistake had failed to express. But it is safest for one party to seek the correction of such errors by the act of all, or through a court of equity, instead of tampering with the writing himself.

§ 215. **Intent.**—An alteration, to avoid a contract, must be intentionally made. If made by accident or mistake, the contract will still be valid in its orig-

inal form. Still, if the alteration was made intentionally, though under a mistaken claim of right, the written contract is avoided, though suit may still be maintained upon the consideration for which it was given, unless such consideration was merged or extinguished by its execution. A material alteration made with fraudulent intent, not only avoids the written contract, but justly prevents recourse to any action for its consideration.

§ 216. **Executed contract—Conveyance.**—The alteration of a deed of conveyance after delivery will not operate to reconvey the title to the grantor, though the holder may be disabled from suing on the covenants or from using it as proof.

§ 217. **Evidence—Presumptions.**—When an instrument is produced appearing upon its face to have been altered, the question arises, when, by whom, and with what intent, the alteration was made. Whether there is a presumption for or against it is a question upon which the decisions are quite seriously in conflict. In view of this state of the law, we should see to it that all papers coming to us as evidence of our rights are free from alterations, interlineations, and erasures, or, if any do appear, that they are noted in the attesting clause.

§ 218. **Loss of written instrument.**—The loss of a written instrument only affects the rights of the parties in so far as it occasions a difficulty of proof. An exception exists in the cases of negotiable instruments. A holder who loses them can not recover unless he gives the defendant an indemnity against the possible claims of third persons.[1]

[1] *Post*, § 328.

CHAPTER XIV.

DISCHARGE OF CONTRACT BY BREACH.

§ 219. **In general.**—If one of the parties to a contract has broken it, or any stipulation contained in it, he becomes liable at once to respond to the other in damages. But whether a breach by one party to a contract of one or several of the stipulations on his part to be performed, operates to discharge the other party from the obligation to perform any or all of the stipulations binding him, depends upon a variety of circumstances, to be noticed presently.

§ 220. **Forms of breach.**—If, before performance is due, one of the parties to a contract renounces his liabilities thereunder and declares distinctly and unequivocally that he will not perform, this constitutes a breach for which the other party to the contract may sue without waiting for the time of performance fixed by the contract to arrive, except where, as in the case of notes or bonds, the contract is unilateral. If a party to a contract, before performance is due, so conducts himself as to render performance impossible, this is a breach for which the other may sue at once. This rule applies where a party agrees to sell and deliver certain chattels to another and before the time for performance had arrived sells them to a third.

The failure of a party to a contract to perform any stipulation therein binding on him is a breach on his part, giving the other party a right to damages unless, by the conduct of the party injured, or otherwise, the failure to perform was in some way justified or excused.

§ 221. **Concurrent conditions.**—If one party to a

contract agrees that he will do a certain thing in consideration that the other shall at the same time do something else, neither party can sue the other unless he has performed, or was ready and willing to perform, his own part of the agreement. The promises are said to be dependent, and a breach by one party releases the other from his obligation to perform.

§ 222. **Independent promises.**—If it appears to have been the intention of the parties that each should perform his part without reference to performance by the other, either may sue the other for non-performance without showing performance, or an offer to perform, on his own part, and a breach by one does not discharge the other.

§ 223. **Independent promises not favored.**—But independent promises are not favored, and the courts will seldom construe as independent promises which form the entire consideration for each other, and the failure of one party to perform his promise will exonerate the other from the obligation to perform on his part. Thus, in contracts for the sale of goods, the obligation of the seller to deliver and the buyer to take and pay for them are, unless credit be given, concurrent conditions. But where one party contracts for the purchase of land, agreeing to pay the purchase price from time to time in certain installments, a deed to be given him on the payment of the last installment, his promise to pay all the installments except the last one are independent of the convenant to convey the land, and he may be sued for each installment except the last as it falls due, though the seller has neither conveyed or offered to do so.

§ 224. **Conditions precedent.**—Where it is expressly or impliedly agreed that the liability of one party to perform shall be conditional upon a prior performance by the other, if the latter fails to perform, the promisee is released, unless he has, by his

own conduct, prevented performance by the promisor. So, if a party agrees, as is often the case, to build a house, the work to be done to the satisfaction of the architect or engineer, and paid for only on the production of the latter's certificate that the work is properly done and approved, the obligation of the owner to pay is conditional upon the production of such certificate. The decision of the architect is in such cases conclusive upon the parties in the absence of fraud or mistake. But if the certificate is withheld by collusion of the architect and the owner, the contractor can recover upon proof of the fraud and of performance.

§ 225. **Subsidiary promises.**—Where a contract contains several promises, the breach of one of which does not frustrate its main object, the breach of such subsidiary promise, not going to the root of the matter and making the performance of the rest a thing different in substance from what was bargained for, will not discharge the injured party from his obligation to perform, though it will entitle him to damages for the breach of the subsidiary term. Of this class, ordinarily, is a warranty of quality in a sale of goods. So, where a building contract has been substantially performed in good faith the contractor may recover, notwithstanding trifling defects, which may be paid for in damages. Where the law would otherwise look upon a term as subsidiary, the parties may expressly agree that it shall be vital to the contract.

§ 226. **Waiver of right to rescind.**—But even though one party to a contract may have a right to rescind for some defect or default in performance on the part of the other, he may, under various circumstances, waive his right. Thus, while one who has contracted for a certain quantity of goods of a certain kind, to be delivered at a certain time, is not bound to take goods of a different kind, or a less quantity, or at a different time, yet if he voluntarily and with

full knowledge of the facts receives different goods, or receives them at a different time, or accepts a less quantity, knowing that no more will be delivered, he can not afterward rescind for the breach, but must seek his remedy for the defective performance by suit for money damages. Again, if a master, with full knowledge of his servant's breach of duty justifying a discharge, voluntarily receives him back or retains him in his service, he thereby waives his right to rescind the contract and discharge the servant.

CHAPTER XV.

REMEDIES FOR BREACH OF CONTRACT.

Damages.

§ 227. **The remedy at law.**—The common law affords no remedy to prevent a breach of duty or to compel the fulfillment of a contract by direct means. The equity sometimes does, but only in exceptional cases.[1] The common law contents itself with waiting until a tort has been committed or a contract broken, and then awards to the injured party a compensation in money for the injury sustained, called damages. While this remedy is often imperfect and sometimes wholly inadequate, the law can not, usually, in its practical workings, afford a better one.

§ 228. **Object of damages.**—In actions for the breach of a contract, indemnity is the object of the law. In other words, the general principle is that the party injured by reason of a breach of contract is entitled to be placed, so far as money can do it, in the same position that he would have occupied had the contract been performed. Yet in practice this principle of actual compensation is so far limited by considerations of convenience and of justice towards defendants that the damages awarded are seldom an exact equivalent of the injury. Thus—

§ 229. **Direct and not remote consequences considered.**—A party who has broken his contract is answerable, as a rule, only for such damages as were present, or must in legal contemplation have been

[1] *Post*, § 233, 234.

present to his mind at the time he contracted, or such damages as would, in the usual and ordinary course of events, arise naturally from his default, and not such as have arisen from some unusual circumstance unknown to him at the time of contracting, nor such as have arisen from the operation of some unforeseen cause intervening between the breach and the damages demanded. Thus, one does not pay money which is due; the creditor in reliance upon this payment has made no other arrangements; he is therefore unable to meet an engagement of his own, his credit suffers, his insolvency ensues, and he is ruined. Yet the defendant will be held liable, ordinarily, only for the debt and interest, for the insolvency of the plaintiff was due directly to the nonpayment of the debt he himself owed, and the defendant's default was only the cause of this cause, and the consequences were not such as necessarily, or even commonly, follow default in paying a debt.

But where special circumstances are communicated by the plaintiff to the defendant at the time of contracting, the latter is answerable for all such damages as are the direct and natural result of his breach of contract under the circumstances so known and communicated. So if a vendor of goods knows that his vendee has a contract to resell them, he may become liable for the loss of profits on such resale if he fails to deliver the things sold, otherwise he is liable only for the difference between the contract price and the market price at the time and place of delivery.

§ 230. **Liquidated damages—Penalty.**—So far we have supposed that the parties have made no special agreement as to the amount of damages to be paid in case of breach. They may make such an agreement, however, and when they have thus assessed the damages in advance, their agreement will bind them, unless it is obnoxious to the rules below. But not every agreement as to damages will stand, nor should

it. Thus, if the amount stipulated to be paid as damages is manifestly in excess of any injury that could possibly flow from the breach, courts will disregard the sum so fixed and treat it as a mere penalty, up to which only actual damages may be recovered and must be proved.

§ 231. **Construction.**—In ascertaining whether damages are liquidated, or a penalty, the following rules of construction are commonly applied:

(1) If the contract is for a thing of a certain value, and a sum in excess thereof is fixed to be paid upon breach, such sum is a penalty and only actual damages will be allowed. This is invariably the rule where a larger sum is agreed to be paid upon default in paying a smaller one.

(2) Where the damages that would follow a breach of a contract are in their nature uncertain in amount, the plaintiff may recover any sum agreed upon as liquidated damages, as, for example, where the agreement is to marry, or not to engage in a particular business within reasonable limits, or to complete a building by a certain day, unless the disproportion between the sum stipulated and any damages that might ensue is plainly gross and unconscionable.

§ 232. **Damages for non-payment of money.**—In actions for breach of contracts to pay money, the measure of damages is usually the debt, with legal interest from the time it fell due to the date of judgment. But where a debtor has agreed to pay higher than the legal rate, though not an usurious rate, or a rate forbidden by law, in some states that higher rate of interest will be given as damages after default. In others only the legal or statutory rate is given for default in payment of the principal and stipulated interest, though a higher rate is agreed to be paid before maturity. The operation of the latter rule may be avoided by inserting after the agreed rate the words, "until paid."

Specific Performance.

§ 233. **In general.**—By the common law the only remedy for a breach of contract is by suit for money damages. Equity, finding this remedy in many cases totally inadequate to complete justice, has, from an early time, compelled the defendant in certain cases to do that which he agreed to do or ought in equity to do independent of agreement.

§ 234. **Inadequate remedy at law—Land.**—Where the remedy by action at law is adequate courts of equity will not interfere. Upon this ground they seldom decree specific performances of contracts for the sale of personal property, except such things as have no market value or have peculiar value to the plaintiff, as works of art, race horses and breeding stock, for the plaintiff can, if disappointed by the defendant, supply himself elsewhere, and sue for damages occasioned by having to pay for them in the market more than the contract price. But if one contracts for land the advantages of the particular site, the neighborhood and similar matters may make money damages a totally inadequate remedy for the vendor's failure to convey. Equity therefore decrees the specific performance of valid contracts for the conveyance of lands or interests therein quite as much as a matter of right as a court of law gives damages. Upon the equitable doctrine that the remedies ought to be mutual, the vendor may sue for specific performance as well as the vendee.

CHAPTER XVI.

DISCHARGE OF RIGHT OF ACTION RESULTING FROM BREACH — LIMITATION OF ACTIONS — ACCORD AND SATISFACTION — ARBITRATION AND AWARD.

Limitation of Actions.

§ 235. **General principle.** — It is a maxim both of law and policy that laws should assist the vigilant, not those who sleep over their rights. While this principle is best and most frequently exemplified by certain statutes, called statutes of limitations, the object of which is to bar out stale and doubtful claims by taking away the remedy for their enforcement after a certain period of quiescence on the part of the creditor, there are some other matters which may be usefully examined first.

§ 236. **Common law — Stale debt — Presumption.** —While the creditor's delay, however long, in suing, did not debar him of his remedy or destroy his debt at common law, yet the lapse of twenty years raised a presumption that the debt had been paid, whether it was due on specialty, on judgment, or on simple contract, provided there had, in the meantime, been no recognition of it by the debtor. This rule is still acted upon in cases the statute of limitations does not reach.

§ 237. **The statute of limitations.**—What was at common law a mere presumption, the statute of limitations has raised into a positive bar, by providing that actions for the enforcement of certain debts and claims must be commenced within a certain time or not at all. Were this not so, litigation would be

perpetual, titles would never be at rest, courts would be flooded with stale and doubtful claims, and parties might be called upon to pay again what they had paid before, or else to preserve their receipts and vouchers indefinitely. After the statute of limitations has thus cut off the remedy upon a debt or claim, it is said to be "outlawed," or, in law phrase, to be "barred."

§ 238. **How long the statute runs.**—While the general rules pertaining to the interpretation of the statutes of limitations have considerable uniformity and permanence, the periods allowed in different states within which actions of various kinds must be commenced differ from each other, and are occasionally changed, rendering it impracticable to give a compend, analysis, or index of the different statutes. In the majority of the states the time for the commencement of actions upon most simple contracts is limited to six years after the cause of action accrued. Upon sealed contracts, the time is often ten and even twenty years, and the same or a longer time is allowed for the enforcement of a judgment.

§ 239. **When the statute begins to run.**—The statutes always provide that actions shall be brought within some specified time, "after the cause of the action has accrued," that is, from the time an action might have been brought. Thus, if credit is given, the statute begins to run not from the date when the debt was contracted, but from the time when payment is due. In all cases where demand is necessary to fix the liability of a party, the statutory time is computed from the date of the demand and not from the date of the contract, or other matter upon which the debt is based. But upon notes and other obligations for the payment of money only "on demand," the statute runs from the date of the debt and not from the date of an actual demand, for it is held, somewhat harshly, that no demand in fact is

necessary to perfect the creditor's right of action, the suit itself being sufficient demand [1]

§ 240: **Mutual accounts.**—In the case of mutual accounts, that is, those containing both debits and credits, most courts recognize an exception to the general rule, and the statute is held to run, not against each item separately from its date, but against the balance from the date of the last item. But the account must be open and current and must consist, not of items on one side only, but of mutual credits, which it appears the parties intended should be set off against each other. Mere charges on one side and payments on the other do not, it seems, suffice.

§ 241. **Matters postponing or interrupting the running of the statute.**—Nothing can ever interrupt the running of the statute, unless the statute expressly provides otherwise. All the statutes, however, make exceptions, and certain matters will, by the express terms of the statute, either prevent it from beginning to run, or interrupt its running after it has commenced.

The infancy or insanity of the plaintiff is an almost universal exception that postpones the running of the statute. But insanity of a plaintiff occurring after the cause of action has accrued will not postpone the running of the statute, unless it is expressly so provided.

By most of the statutes the absence of the defendant from the state or county where the cause of action accrues, is an exception postponing the running of the statute. Absence from the state when the cause of action accrues must be distinguished from subsequent absence or removal. Such subsequent absence or removal will interrupt the running of the statute only where it is expressly so provided, and is independent of provisions as to absence at the time the cause of action accrued.

[1] See, also, *post*, § 356.

§ 242. **New promise — Acknowledgment.** — Any fresh and unequivocal promise to pay a debt once barred by the statute revives the remedy and causes the statute to run anew from the date of such promise. And a new promise to pay a debt, made after the statute has commenced to run but before the original cause of action has been barred, causes the statutory time to run anew from the date of the new promise.

§ 243. **Sufficiency of promise or acknowledgment —Writing.**—A new promise, direct and unequivocal, to pay the debt is sufficient. A bare admission by the debtor, without more, that he owes the debt, will not, in most states, remove the bar of the statute. It must, to have that effect, be consistent with a promise to pay, so that the law can infer such promise from the acknowledgment itself. If accompanied by a distinct refusal to pay, it would be everywhere insufficient. But further the decisions are not harmonious. In many states a new promise or acknowledgment must be in writing and signed by the party to be charged, though otherwise, as to its sufficiency, the law remains the same. Except in three or four states this does not change the effect of part payment, so as to require written evidence thereof.

§ 244. **Part payment.**—Part payment of principal or interest usually causes the statute to run again from the date when it was made, whether the debt has been barred or not. On the ground that actions speak louder than words, it furnishes a ground for implying a new promise to pay. But the payment must be made as a part of a larger debt, otherwise it will be a payment only so far as it goes, leaving the balance outlawed as before. And if there is a distinct denial of any debt beyond the sum actually paid, the bar of the statute will remain as to the rest.

Accord and Satisfaction.

§ 245. **Definition.**—Accord and satisfaction as a method of discharging a contract or a cause of action, whether it arises from a breach of a contract or the commission of a tort, is the substitution of an agreement between the parties in satisfaction of such a cause of action and an execution of such agreement. Thus: If A owes B $50 and A gives, and B receives, a cow, in full satisfaction of the debt, such debt is discharged as completely as if it had been fully paid in money.

§ 246. **The rule of consideration herein.**—The rule of consideration has received a somewhat strained and technical application to the subject before us. Thus, if in the case above, B had agreed to forego the debt without payment or without performance, such agreement would be no defense, in the absence of a sealed release, upon the ground that there was no consideratiou for B's agreement to waive his rights; and had A paid and B received $25 in full satisfaction of the $50 debt, the satisfaction would have been good only to the extent of the amount actually paid, upon the ground that B had no consideration for his promise to forego the rest. But while the rule exemplified by these cases is settled law, except in a few states where statutes have altered the rule, it is said to be entirely technical. The courts, therefore, have been equally technical on finding a consideration beyond the part payment to support the defense of accord and satisfaction.

§ 247. **What a sufficient consideration.**—If, in consideration that the debtor will pay a part before the debt is due, or at a different place, the creditor agrees to forego the rest, this is sufficient, and a payment and acceptance of the part at the earlier date or at such different place will discharge the debt.

If the debt is unliquidated, uncertain or honestly

in dispute, the payment or acceptance in full of a smaller sum than may prove to be really due is a complete satisfaction.[1] And if in discharge of a money debt the creditor accepts in full some different thing, as merchandise or services, he can not sue, though the thing received be clearly less in value than the debt. So, if the debtor receives in full satisfaction the obligation of a third person, though for a less sum, the debt is discharged, and the debtor's own negotiable note given and accepted in full is a satisfaction of a larger debt, is likewise a complete discharge, the consideration being the supposed benefit to the creditor arising from the transferable quality of the note.

§ 248. **Same—Several creditors—Composition.**—If several creditors of the same debtor agree with the debtor and each other to accept in full satisfaction less than is really due, all are bound as soon as the part payment is made, for the forbearance of each is supposed to benefit the others who might otherwise lose their debts.[2] Such an agreement is called a composition with creditors, and if it is embodied in a sealed writing the instrument is called a composition deed.

§ 249. **Sealed release.**—One may release a single creditor or any number of creditors by an instrument under seal without payment of the whole or any part of their debts, for the seal imports consideration, or, more properly, supplies the place of it.

§ 250. **Accord executory.**—It is generally laid down that accord without satisfaction is no bar. This means that unless the debtor has given and the creditor received what it was agreed upon between them should satisfy the debt, there is no defense to an action for the original claim. But this does not mean that the acceptance of a new promise in place of the old is not a good defense where it is the clear

[1] *Ante*, § 40.
[2] *Ante*, § 156.

intention of the parties that the new promise rather than the performance shall satisfy the debt, as where a debtor's note is received in absolute payment of a pre-existing obligation.

Arbitration and Award.

§ 251. **Definitions.**—Arbitration is the investigation and determination by one or more unofficial persons, called arbitrators, of matters in dispute between contending parties, who have chosen them to determine the same. The agreement or contract by which the parties undertake to refer a matter to arbitration is called a submission. The judgment of the arbitrators, and also the paper on which it is written, is called an award. Generally all civil matters of doubt or difference may be submitted to arbitration.

§ 252. **The submission.**—A submission to arbitration is a purely voluntary act on the part of the disputants. But in many states are statutes which, while they do not make arbitration compulsory, prescribe a certain form for the submission, and provide specially for the enforcement of awards where the parties have proceeded in strict accordance with the statute.

The submission, at common law, may be oral or in writing, sealed or unsealed. But where the thing in controversy can be transferred only by writing or under seal, an award purporting to pass the title is void, unless the submission was in writing or under seal. Submission under statutes must be in the form prescribed by the legislature.

§ 253. **Effect of award.**—An award once properly made is binding on the parties. It operates between them substantially as a judgment of a court, and while unimpeached for cause, it is, in like manner, final and conclusive as to all matters submitted to and passed upon by the arbitrators.

NEGOTIABLE CONTRACTS.

COMMERCIAL PAPER—BILLS AND NOTES.

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Checks.
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CHAPTER XVII.

NEGOTIABLE CONTRACTS, WITH PARTICULAR REFERENCE TO BILLS OF EXCHANGE AND PROMISSORY NOTES.

§ 254. **In general.**—Having discussed the rules governing contracts in general, we now come to examine a class of contracts that play a most important part in the commercial and economic operations of modern society. These contracts are called negotiable, and form, as it were, a kind of exchange medium or substitute for money, economizing the use of coin and currency to an enormous degree. In fact, their very use as a substitute for money has served to formulate with respect to them a body of law in many respects different from that which governs ordinary contracts. The instruments in question are, most commonly, bills of exchange, promissory notes and bank checks, for to them the quality of negotiability is most frequently annexed.

Nature and Elements.

§ 255. **Assignability and negotiability contrasted.**—The rights under a contract may usually be transferred so as to enable the assignee, as the transferee is called, to sue and recover if the party from whom he derived his title could. This is particularly true of the mere right to receive money under a contract. But the assignee of an ordinary debt or chose of action is subject to be met in the enforcement of his claim by whatever defenses existed or arose between the debtor and original creditor, not only at the time of assignment, but down

to the time when the debtor had notice of it. Furthermore, the assignee is permitted to sue at law, in the absence of the statute, only in the name of his assignor.

If an instrument is negotiable, however, its assignment in conformity with mercantile custom gives the assignee a legal title and a right to sue in his own name. No notice to the debtor is necessary to perfect this title, and the assignee may enforce payment without being subject to be met by defenses, not apparent upon the face of the paper, of which he had neither knowledge nor notice at the time he took it and gave value for it. In this respect a negotiable instrument is analogous to money, for one who takes coin or currency from a thief or a finder without knowledge of the loss or theft, giving value in exchange therefor, can hold it even against the true owner. In fact, this very rule as to theft or finding applies to negotiable instruments which, being payable to bearer, or indorsed in blank, are transferred like money by mere delivery. These rules are grounded in public policy which demands that both money and the instruments which do its work should be taken fearlessly, so that their circulation will be encouraged and promoted.

§ 256. **What instruments are negotiable.**—Originally the quality of negotiability was conferred by the custom of merchants upon foreign bills of exchange alone. Later it was extended to domestic bills, promissory notes and bank checks. But even these instruments may be drawn in such form as to be non-negotiable, when they are subject, in general, to the ordinary law of assignment.[1]

§ 257. **Bills of exchange, definition and nature.**—A bill of exchange is an unconditional written order

[1] In a few states notes are negotiable only when payable at a bank, or when, in addition to the ordinary words of negotiability, they contain the words, "without discount or defalcation," or the words, "value received."

by one person upon another, directing him to pay to a third person, or to his order, or to the bearer, a sum of money therein named. The term draft is sometimes used as the equivalent of bill of exchange, but it is a more general term and includes other orders for money, or even for goods. The party who draws a bill is called the drawer; the party upon whom it is drawn is called the drawee, and the party in whose favor it is drawn is called the payee.

A bill of exchange is commonly in the following form:

£1,000. NEW YORK, July 1, 1894.

Ten days after sight of this first of exchange (second and third unpaid) pay to the order of Henry Houghton one thousand pounds sterling, and charge the same to the account of

WILLIAM WHITNALL.

To George M. Powers, London, England.

As illustrating the use of this bill, suppose Whitnall, of New York, has sold to Powers, of London, a quantity of flour worth £1,000, and that Miles, of New York, has bought of Wilson, of London, a quantity of cloth worth a like sum. If the indebtedness of these parties were to be adjusted by the shipment of coin, £2,000 would be withdrawn from the channels of trade during the period of transportation. Add to this the cost of insurance and shipment and the trouble and inconvenience to the parties, and we have some idea of the advantage derived from the use of a bill of exchange. In this case Houghton pays Whitnall for the bill in New York, and is then entitled to receive the money in London. Houghton transfers his title to these funds to his London creditor by indorsement; that is, by writing upon the back of the bill, "Pay to the order of Edward Wilson," and transmits it to Wilson. Wilson presents it to Powers, in London, who writes on the face of it, "Accepted July 12, 1894," and signs his name. On the thirteenth day after acceptance Wilson presents the bill to Powers, who pays it. So far as the

transportation of the money is concerned, the flour and cloth have been made to pay for each other.

This bill has still another use. It may pass from hand to hand very much like money. Wilson may, during the thirteen days it has to run, transfer his title to Jones by an indorsement like that through which he acquired his title. Jones and others after him may transfer the bill in like manner in the payment of debts or in consideration of money or goods. When it is finally paid by Powers at maturity it may have served the purpose of money in an indefinite number of transactions.

§ 258. **Foreign and inland bills.**—A foreign bill of exchange is a bill drawn in one state or country and payable in another state or country; an inland bill of exchange is a bill drawn and made payable in the same state or country.

If a foreign bill is dishonored by non-payment or non-acceptance it must be protested in order that the drawer may be held liable for its payment.[1] The distinction is also important in determining what law is to govern the contracts of the several parties interested. A bill drawn in one state of the Union and payable in another is a foreign bill.

§ 259. **Sets of exchange.**—Foreign bills of exchange are usually drawn in triplicate in order to expedite their transmission and insure their receipt by the payee The three bills are called a set. In law they all constitute one instrument, each being so worded as to give warning of the others. Thus, the first would read, "Pay to the order of A this first of exchange (second and third unpaid)," and the second and third would give warning of the others in like manner. Where one of the bills of a set is paid the others stand void. But the drawee should take care not to accept more than one part, for if he accepts more he may be liable to different holders of the several parts. Only one part should be indorsed, for if

[1] *Post*, §§ 337, 338, *et seq.*

the payee negotiates two or more parts he may be liable as an indorser for the payment of them to all the different holders.

§ 260. **Note—Definition and use.**—A promissory note is an unconditional written promise to pay to another's order or to bearer a specified sum of money at a specified time. The party promising is called the maker, and the party to whom the promise is made is called the payee.

A negotiable note is commonly in the following form:

$700 DETROIT, MICH., Oct. 1st, 1894.

Sixty days after date I promise to pay to the order of Frank Boyd seven hundred dollars, value received, with interest at five per cent. per annum until paid. JOSEPH ARMSTRONG.

Armstrong buys goods of Boyd on sixty days' time and gives him a note as above. Before the term of credit has expired, Boyd needs money or additional goods. Cook is willing to let him have either, provided he will give him this claim against Armstrong. Boyd transfers it to Cook by indorsing it on the back, "Pay to the order of Cook." Cook may indorse it further, and so may his transferee. The contract may thus pass from hand to hand indefinitely, performing the function of money, until it is finally presented to Armstrong at maturity and paid by him.

§ 261. **Check, definition, nature and use.**—A check is a brief order or draft on a bank or banker, directing the payment of a sum of money to a third person on demand.

The parties are called the drawer, drawee (bank), and payee, as in a bill of exchange.

MILWAUKEE, Sept. 9th, 1897.

First National Bank, Milwaukee:

Pay to the order of Albert Barnes..... $200 00

Two Hundred..... Dollars

B. J. JOHNSON.

While a check has many of the characteristics of a bill of exchange, it is in some respects essentially

different. It is always drawn upon a bank or banker, and is payable upon demand without grace. Neither is it subject to the law of acceptance in the ordinary sense; and though it may be certified, which is very similar to acceptance, certification usually releases the drawer, while acceptance of a bill does not. Some other differences and distinctions will be noticed later.[1]

Bearing in mind that a bank is simply the debtor of its ordinary depositors, let us suppose that Barnes deposits in the same bank with Johnson. He buys goods of Johnson and gives his check for the price. When Johnson deposits he may hand Barnes' check to the banker with any other checks or money he may wish to deposit. So far as this check is concerned, the banker has merely to debit Barnes and credit Johnson. Payment has thus been made without the handling of money. But instead of depositing this check, Johnson might have transferred it to Jones and Jones to Brown. It might have circulated as money and performed its functions in a number of transactions before being finally presented to the drawee bank and credited to a depositor, or paid in cash.

Banks constantly pay checks drawn on other banks or credit them to their depositors. The mutual debits and credits thus arising between the banks of large cities are adjusted through what is called the clearing-house. This is a place where the representatives of the several banks meet every day, and each bank exchanges all the checks on other banks that it paid or credited to depositors the previous day, for all checks on it that the other banks have paid or credited to their customers.[2]

[1] *Post*, § 344, *et seq.*

[2] The clearing-house will be found explained in all modern works on banking and in most standard works on political economy.

Of the Elements of a Negotiable Contract.

§ 262. **In general.**—The peculiar protection which the law throws around bona fide holders of negotiable instruments is because they represent money and do its work. A contract to be negotiable, therefore, must possess certain elements necessary to make it an adequate and proper representative of money. If any one of these elements is lacking the instrument has not the quality of negotiability, though it may still be assigned so as to give the assignee the rights of his assignor, but no greater or better.

§ 263. **Must be in writing—Signature.**—Writing is absolutely essential to a negotiable contract, for a mere oral bargain can not pass as money. Writing includes printing and engraving, as in the case of contracts generally. An unsigned paper is not a bill or note.

§ 264. **Bills and notes should not be sealed.**—Where the distinction between sealed and unsealed instruments is still maintained, the addition of a seal to a bill or note destroys its negotiability. But by statutes in some states, sealed bills and notes are negotiable, and in those states where the distinction between sealed and unsealed contracts has been abolished, the addition of a seal has no effect.

§ 265. **The date.**—Bills and notes should be dated. Yet a bill or note from which the date has been omitted is valid, and would be given effect from the time it was shown to have been delivered. While the date expressed in the instrument is prima facie the date upon which it was delivered, as between the immediate parties delivery may be proved to have been made at some other time.

§ 266. **Promise or order must be positive.**—Every note must contain a promise. A mere acknowledgment of indebtedness without any promise of payment is not a promissory note. Thus, a simple I. O. U. is not a promissory note. But if there is an-

nexed to the acknowledgment of indebtedness a promise of payment, the instrument becomes a note. Some authorities, however, seem to consider a mere due bill to be a promissory note, provided it contains words of negotiability.

A bill of exchange must contain an order and not the request of a favor merely. But the polite expression, "Please pay," will not deprive the instrument of the character of a bill, if it appears that an order was intended rather than the request of a loan as a matter of favor.

§ 267. **Order or promise must be unconditional.**—A promise or order payable upon a contingency which may never happen is not negotiable, even when expressly payable to bearer, or to the order of the payee, though it may be valid as a contract, and assignable. Thus, a promise to pay when certain property is sold, or when a certain ship arrives, is not a negotiable note, for it is not a proper substitute for money. But the mere fact that the paper is payable only upon the happening of some event therein specified does not destroy its negotiability provided such event must happen some time. Thus, a bill or note payable a certain length of time after the death of a party is negotiable.

It is uniformly held that a bill or note expressly payable out of a particular fund is not negotiable, for its payment is, in effect, contingent, not only upon the existence of the fund, but also upon its sufficiency. But the acceptance by the custodian of a particular fund of a draft drawn upon it renders such draft negotiable.

§ 268. **Must be payable in money.**—A contract which is payable in something other than money is, in the absence of statute, non-negotiable. Thus, a note payable in goods, which is commonly called a chattel note, is not negotiable. So, an order for goods is not a negotiable bill, though payable to order or bearer.

A bill or note expressly payable in the currency of a foreign country is probably non-negotiable. But the mere fact that the amount of the paper is expressed in the terms of a foreign currency does not render it non-negotiable. A bill drawn in England on New York and expressed to be for so many pounds would be construed as a bill for an equivalent sum in our own money.

§ 269. **Amount must be certain.**—Where the amount to be paid is uncertain the instrument is not negotiable. If it is to circulate as money it is as necessary to know the precise amount of money of which it is to take the place and do the work, as to know that it is to be payable in money at all. Thus, a promise to pay a certain sum, subject to the deduction of uncertain charges, is non-negotiable, and so of a note for the proceeds of a certain consignment, or a draft for "whatever you may collect for me."

It is usual to express the amount to be paid, both in words in the body of the instrument and in figures in the margin. If there is a variance between the words and figures, the words control.

§ 270. **Must be payable in money only.**—A negotiable instrument must be payable in money only. If it involves other matters, such as the delivery of goods or the performance of services, it is non-negotiable, unless otherwise provided by statute.

§ 271. **Certainty as to payee.**—The party entitled to payment should be certain. But it is well settled that a bill or note papable to bearer is negotiable. It passes by mere delivery, like coin or currency, and whoever has possession of it is presumptively the true owner and entitled to payment.

A note payable to "A or B" is not negotiable.

§ 272. **Negotiable words.**—The intention of the parties to make a negotiable contract must in the absence of statute appear from the language of the instrument itself. The words commonly used to indicate negotiability are either, "Pay to bearer," or,

"Pay to A or bearer," which have the same effect except in one or two states,[1] or "Pay to A or order," or, "Pay to the order of A," which have the same effect everywhere. These, or words of like import, are necessary to render a promissory note negotiable.

§ 273. **Delivery.**—Delivery being the final step necessary to perfect a written contract, a bill or note written and signed but not delivered is inoperative. But possession of a note or bill by the payee raises a presumption of a valid delivery. If the payee gets possession of the paper without the consent of the maker, he can not enforce it against the latter, though his indorsee may sometimes do so, provided he took the paper in the belief that it had been actually delivered.

§ 274. **Blanks and filling them.**—Sometimes parties sign negotiable instruments in blank, and to deliver them in that condition to third persons who are authorized to fill them up on certain terms and to negotiate them for their own benefit or for the benefit of the signer. If the party thus entrusted with the paper fills it up in strict accordance with his authority or instructions, the signer is bound. If the party entrusted acts in violation or excess of his authority, the signer is not bound to him or to any other party who has notice of the wrong. The signer will be liable, however, to any person who takes such paper in good faith, for value and before maturity, provided what was written conformed to the evident tenor and purpose of the blank, even though the holder exceeded his authority, for he who was first to trust must be first to suffer.

§ 275. **Parties to bills and notes.**—The parties to bills and notes must be competent to contract. A note or bill void or voidable in the hands of the original payee for the incompetency of a party executing it, is likewise void or voidable, as a rule, even in the hands of subsequent bona fide holders.

[1] *Post*, § 291.

The indorsement of a minor is sufficient to pass the title to the paper as against prior parties, though he is not liable as an indorser upon its dishonor.

§ 276. **Of the consideration of a bill or note.**—As between every party to a note or bill and every person with whom he directly contracts, or who takes the paper with notice of the facts, the lack, failure, or illegality of the consideration is a complete defense substantially as in other cases of simple contracts. But while in the case of other simple contracts, consideration must be alleged and proved, with negotiable instruments the form is said to raise a presumption of consideration which throws the burden upon the defendant to show its absence. The presumption is the same, though the words "value received" are omitted, except where statutes have changed the rule.

After a negotiable instrument has passed into the hands of the one who took it in good faith, for a valuable consideration, and before maturity, however, no inquiry into the consideration can be made. Such holder may recover against prior parties unaffected by the fact that as to them the consideration was entirely lacking or had wholly or partially failed, or by the fact that it was illegal, unless the statute expressly declares void contracts founded upon an illegal consideration of the kind in question.[1]

§ 277. **Accommodation paper.**—One may lend his credit to another by signing his name as maker, drawer, acceptor, or indorser of a commercial instrument. If he does this without consideration he is called an accommodation party, and the paper is accommodation paper. Thus if A wishes to borrow money, X may sign a promissory note in favor of A who may then procure it to be discounted. It is the duty of A rather than X to pay the note at maturity, and if X is compelled to pay it to the holder he may sue A for the amount. But the party who has

[1] *Post*, § 309.

taken the paper upon the credit of X may, of course, sue him if he did not know that he signed without consideration, in conformity with the rules stated in the preceding paragraph. And even though he knew that the paper was given for accommodation only, he might hold X liable, for such loans of credit are so common in business that they are said to form an exception to the general rule requiring a consideration to support a bill or note, and allowing the defense of lack of consideration to be made against third parties who take with knowledge of its absence.

Before the party to whom the loan of credit has been given has disposed of the paper the accommodating party may revoke his signature, and the death of the latter would have the same effect. But this revocation is not available as against one who took the paper for value before the revocation was made known to him.

CHAPTER XVIII.

ACCEPTANCE OF BILLS.

§ 278. **In general.**—Acceptance may be briefly defined as an undertaking by the drawee in favor of the holder, to pay the bill in accordance with the tenor of the bill or the tenor of the acceptance.[1] Before acceptance the drawee is a mere nominal party to the bill, and his liability is solely to the drawer on account of the funds in his hands, and not upon the bill itself, either to the drawer or to the payee or holder. The moment the drawee accepts the bill, however, he becomes the principal and primary debtor. In this respect his obligation is strictly analogous to that of the maker of a note. The drawer who, up to the moment of acceptance, has been a guarantor of acceptance, now becomes a guarantor of payment, substantially like the indorser of a note.

Presentment for Acceptance.

§ 279. **Necessity for presentment.**—The drawer and indorsers of a bill of exchange are guarantors of acceptance and payment. But they assume their liability in the expectation that the bill will be duly accepted and paid, and they can not be held unreasonably long through the holder's neglect to present the bill for acceptance, if acceptance is necessary, for they are entitled to know whether the bill will be accepted or not, so that they may protect their rights in case of dishonor.

[1] *Post*, §§ 286, 287.

Whenever it is the holder's duty to present the bill for acceptance, and he fails to do so at the proper time, he loses his remedy against the drawer and indorsers, not only on the bill, but on the consideration or debt for which it was given or transferred.

§ 280. **What bills must be presented for acceptance.**—All bills payable so many days after sight or demand must be presented for acceptance without unreasonable delay. And the same rule applies to bills payable at sight, at least where they are entitled to grace. But bills payable upon demand, or a certain number of days after date, or on a day certain, or upon any other certain event, need not be presented except for payment, unless the drawer has directed presentment for acceptance. But it is the wisest and usual course to present for acceptance bills payable on a specified future date. If, in such cases, acceptance is refused, the holder must proceed in the same manner as if the bill had required acceptance in the first instance.

§ 281. **By and to whom presentment should be made.**—Presentment for acceptance should be made by the holder or his lawfully authorized agent. In the case of a foreign bill the presentment should be made by a notary public.

Presentment for acceptance must be made to the drawee or his authorized agent. A bill drawn on a firm may be presented to any member of the firm, but a bill drawn on several who are not partners should be presented to all. Where the drawee is dead, presentment should probably be made to his personal representative.

§ 282. **Place of presentment.**—Presentment may be made either at the drawee's residence or at his place of business. If the bill is addressed to the drawee at a particular place, presentment for acceptance should be made at that place. If the drawee

has changed his place of business or residence, the holder must use due diligence in discovering its whereabouts and in presenting the bill. If, after diligent search and inquiry, the drawee can not be found, the bill may be treated as dishonored.

§ 283. **Hour of presentment.**—Presentment at a place of business should be made during customary business hours. What are such hours will depend upon the custom of the place and of the business. If the drawee or his agent is actually found at the place of business the hour of presentment is immaterial. It is sufficient if the bill is presented at the drawee's residence at any time before the customary hour of retiring. Demand should be made at a bank during usual banking hours.

§ 284. **On what day.**—If the bill is payable on demand, or on a fixed day after date, or on a certain day named, no presentment for acceptance is necessary, as we have seen, unless the drawer has directed it. But wherever the paper requires presentment in order to fix the liability of drawer and indorsers, acceptance must be demanded within a reasonable time after the bill is delivered to the payee, otherwise the drawer and indorsers are released. What is a reasonable time within which to present such bills for acceptance depends upon the facts and circumstances of the particular case. The safe course is to present them with all reasonable dispatch.

§ 285. **Manner of presentment.**—The holder must have the bill with him when he demands acceptance so that the drawee may inspect it and ascertain its genuineness. The drawee is entitled to retain the bill twenty-four hours in order that he may examine into the state of the drawer's account and determine whether or not he will accept the bill.

§ 286. **Acceptance—How made.**—Commonly an acceptance is in the following form: "Accepted Jan. 10th, 1895," under which the drawee signs his name. The acceptance is usually upon the face of

the bill and across it, though an acceptance on any part of the bill would be good.

After words of acceptance are written on the bill the acceptance is still incomplete and may be recalled and canceled at any time before the acceptor has delivered the bill back to the holder. When redelivered to the holder, however, the acceptance is a completed contract and beyond the acceptor's recall.

The acceptance should be dated, though if the date be omitted the true date of acceptance may be proved.

Statutes in many states require the acceptance to be in writing, and the validity of verbal acceptances has sometimes been questioned, even where no such statutes exist. Statutes in some states further require that the acceptance shall be *written on the bill*. But where no such provision exists, the acceptance may be upon a separate paper, and will bind the acceptor to every holder who knows of the acceptance and takes the paper on the faith of it.

§ 287. **The effect of an acceptance.**—By accepting a bill the drawee becomes the principal debtor thereon. He is in practically the same position and under the same obligations as the maker of a note, absolutely liable for its payment.

The drawee is bound to know the signature of the drawer and is estopped by his acceptance, as against innocent parties, to show the forgery of the drawer's signature or his lack of capacity to draw. If the bill purports to be drawn by an agent the acceptor is estopped to show his lack of authority to draw. But the acceptor is not estopped to show forgery as against the forger himself, or any person who acquired the paper with knowledge of the wrong; and he may show against any person, however innocent, that any signature other than the drawer's is forged.

Neither does acceptance warrant the genuineness of the body of the bill, and the acceptor may show

that it was altered without authority, even though the alteration took place before acceptance.

Though the holder of a bill is not bound to take an acceptance that differs from the tenor of the bill, he may do so and the acceptor will be bound according to the tenor of the acceptance. But by taking such an acceptance the holder loses recourse against all prior parties to the bill who do not consent, for they have warranted that the bill will be accepted and paid according to its tenor and not otherwise.

An acceptance for only part of the amount for which the bill is drawn, or an acceptance payable at a totally different place from that to which the bill is directed, or at a different time, or upon a condition not mentioned in the bill, is not according to the tenor of the bill.

CHAPTER XIX.

NEGOTIATION AND TRANSFER OF BILLS AND NOTES.

Rights of Bona Fide Holders.

§ 288. **In general.**—Bills of exchange, promissory notes and bank checks are all negotiable in the same manner and subject to substantially the same rules. Whatever is said under this title is to be taken as applicable to all these instruments unless otherwise indicated.

§ 289. **Transfer by delivery.**—A bill or note payable to bearer may be transferred like currency by mere delivery. And a bill or note payable to order, but indorsed in blank by the payee, or by any subsequent holder to whose order it was made payable by indorsement, is transferable thereafter by delivery only. But one who transfers paper thus capable of transfer by delivery may indorse it if he chooses and the transferee requires it, and will incur thereupon all the liabilities of an indorser.

§ 290. **Liability of transferrer by delivery.**—It is a popular idea that one who transfers, without indorsement, negotiable paper payable to bearer or previously indorsed in blank, incurs thereby no liability whatsoever in favor of the transferee. But this is not so. He impliedly warrants that the signatures and the body of the instrument are genuine, unless there is an express agreement that the transfer is made without such warranty.

The transferrer by delivery also impliedly warrants that the parties to the instrument are competent to contract, and that it is a valid, subsisting obligation,

binding upon prior parties according to their evident and ostensible relations to it, and he is liable for a breach of this warranty though he did not know it was void when he transferred it. He also impliedly warrants his title and right to make the transfer.

The transferrer by delivery does not warrant that the paper, if an unaccepted bill, will be accepted when presented for acceptance, nor does he warrant that it will be paid. But the question whether he does or does not warrant that prior parties are solvent at the time of transfer, has given rise to conflicting decisions. If the transferrer knows them to be insolvent, and conceals the fact, he is liable for the fraud.

§ 291. **Transfer by indorsement.**—An indorsement in the ordinary sense of the law merchant is a writing on the back of a bill or note, made by the original payee or a subsequent holder, for the purpose of transferring the legal title thereto to another, or for the purpose of incurring the liabilities of an indorser, or for both purposes.

Though a bill or note payable "to bearer," or to a certain person "or bearer," or previously indorsed in blank, may be indorsed by the holder, his indorsement is merely for the purpose of warranting payment, and is in no wise necessary to pass the legal title.[1]

But a bill or note payable to a certain person "or order," or "to the order of" a certain person, can be transferred so that the legal title will pass to the transferee, only by the indorsement of the payee. One who indorses a bill or note is called an indorser; the party taking the paper is called the indorsee. The indorser may indorse in full, thus: "Pay to the order of A," or he may indorse it in blank. A

[1] By statute in Alabama, Colorado and Illinois, paper payable to a certain payee "or bearer" must be indorsed by the payee to pass the legal title.

blank indorsement consists of the indorser's signature merely. If he indorses in full, the indorsee must, in order to transfer the paper further, indorse it in turn. If he indorses in blank, the paper becomes in effect payable to bearer and the legal title can be subsequently transferred any number of times by mere delivery.

If paper payable to order or indorsed to the holder in full is subsequently transferred without indorsement, the legal title does not pass to the transferee. Only the equitable title passes and the transferee is subject to be met, in enforcing payment, by any defenses that would have prevented a recovery by the party from whom he took the paper.

The Indorser's Contract.

§ 292. **In general.**—Every person who indorses a bill or note, whether in full or in blank, becomes liable upon a contract, the nature and limits of which are quite precisely determined by law, and is subject in favor not only of his immediate indorsee, but also in favor of every subsequent bona fide holder, to certain well-defined liabilities, unless, by the form of his indorsement, he declines to assume them. Each indorsement is a new and independent contract, subject to the law of the place where it is made.

§ 293. **What indorsement warrants.** — The indorser of commercial paper impliedly warrants, of course, everything that is impliedly warranted by a transferrer by delivery. But his contract goes further, and he impliedly warrants:

(1) That the paper, if an unaccepted bill, payable at a certain time after date or sight, will be accepted unconditionally by the drawee when presented to him for acceptance.

(2) That if it is a promissory note or an accepted draft, payable at a future day certain, that it will be paid if duly presented for payment at maturity, or,

if it be due on demand, that it will be paid if payment is demanded within a reasonable time.

(3) That if the paper is, in any of these cases, dishonored by non-acceptance or non-payment, as the case may be, he (the indorser) will pay the same, provided he is duly and promptly notified that dishonor has taken place.

§ 294. **Liability a conditional one.**—The liability of an indorser, is a conditional one. Like the drawer of a bill, his liability is conditional upon due demand of payment or acceptance, and due notice of the fact of dishonor, if dishonor takes place, unless he has in some way waived his right to have demand made and notice given.[1] In fact, if the instrument is a promissory note or accepted draft the indorser may be regarded as occupying substantially the same position as the drawer of an accepted bill, and the indorser of an unaccepted bill may be considered simply as a new drawer.

§ 295. **Exception—Indorsement without recourse.**—If the indorser incorporates into his contract the words "without recourse," or equivalent terms, his liability is practically the same as that of a transferrer by delivery.

§ 296. **Indorsers—Order of their liability.**—Indorsers are prima facie liable in the order in which their names appear. Ordinarily, therefore, one who takes indorsed paper may look to the drawer, maker, or acceptor, or to any indorser whose name was on the instrument when he took it, and any indorser who is compelled to pay the paper may look as well to any party whose name was upon the paper when he took it as to the maker or acceptor, assuming, of course, that no party can be held whose liability is conditional upon demand and notice, unless demand has been duly made and notice given.

But it may always be shown as against any party having knowledge of the facts that indorsements

[1] *Post*, § 343.

were made in some other order than that in which they appear on the paper. If two parties are joint indorsers they must be sued together though their indorsements appear successively.

§ 297. **The place for indorsement.** — While the proper place for indorsement is on and across the back of the paper, it is valid if written elsewhere, provided the writing was meant to be an indorsement. If successive indorsements have completely covered the back of the paper, it is lawful to attach to it another paper entitled an *allonge*, upon which further indorsements may be written.

§ 298. **Restrictive indorsement.** — Any indorsement which restrains the further negotiation of a bill or note is called a restrictive indorsement. It is one that vests the title in the indorsee as a trustee or agent of the indorser or a third person. It gives warning that the indorsee is not owner of the beneficial interest in it, and that he merely has authority to hold it until maturity and receive the amount of it for another. Indorsements for collection are restrictive, thus: "Pay to A for my account;" "Pay to A for my use;" "Pay to A for the use of B;" "For collection with Farmer's Bank." "Pay to A only," is probably a restrictive indorsement, but the mere omission of words of negotiability from an indorsement does not make it restrictive.

§ 299. **Irregular indorsements.**—If one who is not a party thereto writes his name on the back of a bill or note, his indorsement is said to be irregular or anomalous. Whether such indorser is liable as a joint maker, as a guarantor, as a surety, or as an indorser, is a question as to which the decisions vary greatly, and in many states oral evidence is admitted to show in what character he actually signed. The safest, course, perhaps, is for the holder to treat an anomalous indorser as a regular indorser and to take the same steps to charge him as if he were such.

Indorsement with waiver.[1]

Of the Rights of Bona Fide Holders.

§ 300. **In general—Who are bona fide holders.**—The only way in which commercial paper can be made to circulate freely as a substitute for money is by protecting those who take it under appropriate circumstances from the danger of loss arising from defenses and defects of title existing between prior parties. The fact that such a protection exists has already been repeatedly stated. It now remains to be seen who are to be protected against defenses and how far this protection extends. Bona fide means in good faith. But using the term bona fide holder as meaning one who is entitled to recover upon the paper in spite of certain defenses existing between prior parties, a bona fide holder of negotiable paper is one who takes it thus: (1) In good faith; (2) Without notice of dishonor or of existing defenses; (3) For a valuable consideration; (4) In the usual course of business; (5) Before maturity. Such a holder may sue in his own name and recover on the paper without being subjected, in general, to any of those defenses which would have defeated a recovery by the party from whom he took it or any prior party. But it is a further rule that if a bill or a note has once passed into the hands of a bona fide holder a subsequent transferee may claim the rights of a bona fide holder, though he may have taken it with notice of defenses, or without giving value for it, or though he acquired it when overdue. In other words, one who is really a bona fide holder may transfer his rights as such, and can give to any subsequent transferee as good a title as he himself had.

§ 301. **Defenses available against a bona fide holder.**—A bona fide holder of a negotiable instrument takes it, as a general rule, free from all equitable defenses. Equitable defenses are those which

[1] *Post*, § 343.

do not appear upon the face of the paper itself. There are some such defenses, however, which are available against even a bona fide holder. What defenses are or are not available against a bona fine purchsser, therefore, will best appear from a somewhat detailed statement.

§ 302. **Incapacity of parties.**—Any party to a negotiable instrument may set up his or her want of capacity to contract, arising from insanity, infancy, or coverture, as a defense to an action by any party into whose hands the paper may come, even though the latter be a bona fide holder.

§ 303. **Illegality.**—Bills and notes made, drawn, accepted, or indorsed upon an illegal or immoral consideration are, as to the party paying such consideration, absolutely void. But in the hands of a bona fide holder for value, and without notice, such instruments are valid, unless expressly declared to be void by statute, in which case they are void in all hands whatsoever.

§ 304. **Forgery — Alteration.** — As against one whose name is forged to a bill or note, the instrument is absolutely void in all hands. And if the paper has been materially altered it is void even in the hands of a bona fide holder. Some, but not all, of the cases hold, that if the party sought to be held was guilty of negligence facilitating the alteration, as by leaving blank and uncanceled spaces, his liability to a bona fide holder for value is the same as though the paper had been originally written as altered. But the acceptance of a bill or the certification of a check will estop the drawee from setting up the forgery of the drawer's signature as a defense to an action by a bona fide holder, though he may still show that the body of the paper was altered even before acceptance or certification.

§ 305. **Instruments not delivered.** — Where a party, to whose order a note or bill is drawn or indorsed, obtains possession of it by theft or fraud, he

can not sue upon it. But a bona fide purchaser of the paper may recover, it seems, provided the party signing has been guilty of negligence facilitating its wrongful appropriation. If there was no such negligence, however, the paper is, by many authorities, void in all hands, whether guilty or innocent. This test of negligence has been applied with such varying results, however, that it is impossible to say what would be held, in all courts, to constitute such negligence as would entitle a bona fide purchaser to recover in spite of the want of delivery.

Blank instrument wrongfully filled up.[1]

§ 306. **Mistake—Misrepresentation.**—Where one without negligence signs a negotiable bill or note in the belief that it is an instrument of a different nature, he incurs no liability to any party, however innocent, any more than if his signature had been forged. Thus, a blind man can do no more than require the instrument to be read to him, and if it is misread, and he signs it, he is not bound. And the same would be true of one who could not read. But if one can read and omits to do so, or being unable to read does not require the instrument to be read to him, he is, by the great weight of authority, guilty of negligence, and can not be heard to say, as against a bona fide holder of his negotiable instrument, that he thought he was signing something of a different character, and must look for redress to those who perpetrated the fraud.

§ 307. **Escrow—Collateral agreements.**—If one to whom a negotiable instrument has been delivered in escrow delivers it to the payee before the happening of the condition upon which its final delivery depends, a bona fide purchaser may recover. No collateral agreement between prior parties to a bill or note, not appearing on the paper itself, will be permitted to defeat the rights of a bona fide holder.

§ 308. **Duress.**—There can be no recovery as be-

[1] *Ante*, § 274.

tween the original parties to a negotiable instrument executed under duress. And it is very doubtful whether one who signs under violent duress is liable even to a bona fide holder, though there are cases to that effect.

§ 309. **Fraud—Consideration.**—Where one executes what he knows and intends to be a negotiable instrument, upon the inducement of false and fraudulent representations as to the consideration, he is nevertheless liable to a bona fide holder for value. So, lack or failure of consideration as between prior parties is no defense to an action by a bona fide holder.[1]

§ 310. **Payment, set-off, compromise, etc.**—The bona fide holder of a negotiable instrument who acquired it for value before maturity may recover thereon as against any prior party in spite of the fact that the party from whom he acquired his title, or any other party thereto, was subject to be met by the defense of payment, set-off, accord and satisfaction, compromise, or release.

§ 311. **Of the elements of bona fides.**—Having ascertained in general what are the rights of a bona fide holder, it becomes necessary to ascertain more in detail who are bona fide holders and entitled to protection as such.

§ 312. **Good faith.**—Bad faith (*mala fides*) will prevent recovery by the holder of a bill or note, unless he derived his title from one who was really a bona fide holder. If one takes a bill or note with actual knowledge of a defense which would defeat recovery by the party from whom he took the paper, he can not recover, for he is not a bona fide holder.

§ 313. **Must be holder for value.**—In order that one may recover free from defenses existing between prior parties, not only must the paper be negotiable, and therefore an adequate representative of money, but it must have come to the holder in the course of

[1] *Ante*, § 276.

its money use. In other words, the holder must have paid a valuable consideration for it, and one who acquires negotiable paper as a gift, or even for a mere nominal consideration, has no better rights against prior parties than the one from whom he acquired it.

§ 314. **Same—The amount of consideration.**—A bill or note may be transferred for less than its face value. But the inadequacy of price may be so gross as to justify the inference that the purchaser is charged with notice of the defective title of his vendor. But it must be remembered that commercial paper has value according to the financial standing of the parties to it; and while inadequacy of price may well be held to charge a purchaser with notice where the signers are known to be solvent and responsible, the same conclusion would not be justified where their credit and solvency are in doubt.

§ 315. **Same—Nature of the consideration.**—One who claims to be a *bona fide* holder for value need not be a purchaser in the sense that he gave money for the paper. It is enough that he parted with property or valuable rights or rendered service in consideration of its transfer to him before he got notice of defenses available against his transferrer.

Of course one who takes the bill or note of a third person in absolute payment of a debt contracted at the time, is a holder thereof for value, and one who takes a bill or note in absolute payment and extinction of a pre-existing debt, and surrenders a previous security therefor, is a holder for value and entitled to be protected against equities existing between prior parties. Where a bill or note is transferred in conditional payment or as collateral security for a debt contracted at the time, the transferee is a holder for value. Even though the paper was taken in conditional payment or as security for a pre-existing debt, if the creditor surrendered other securities on the faith of the transfer, he is a holder for value. So, if

the creditor in consideration of the transfer of a bill or note to him expressly agrees to forbear for a time from suing upon the pre-existing debt, though he retains his right of action thereon, such agreement to forbear will constitute him a holder for value. Further than this, the decisions are not entirely in accord, and in the absence of an express bargain for credit, one who takes a negotiable instrument as collateral security for or in conditional payment of a pre-existing debt, without surrendering any previous remedy or security for such debt, is not regarded as a holder for value in many courts, though in others, including the supreme court of the United States, he is a holder for value within the protection of the law merchant.

§ 316. **Usual course of business.**—In order that the holder of a bill or note may be protected against those equities which might have prevented a recovery by his immediate transferrer, he must have acquired the paper in the usual course of business. If he acquired it otherwise he is not entitled to protection, though he may have paid full value for the instrument. One who takes by mere delivery the equitable title to a bill or note payable to order, is not a holder in the usual course of business,[1] and the same is true of receivers, assignees in bankruptcy and under insolvent laws, assignees for the benefit of creditors, and executors or administrators.

§ 317. **Time of transfer—Before and after due.**—Overdue or dishonored paper may still be transferred, either by indorsement or delivery, to the same extent as before maturity. But where a negotiable instrument is found in circulation after it is due it carries suspicion on its face, and although it does not give the indorsee notice of any specific matter of defense, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject

[1] *Ante*, § 289

to any defense which might be made if the suit were brought by the indorser.

§ 318. **When paper overdue.**—A bill or note payable a certain time after date is always overdue after the last day of grace.

A bill or note payable on demand is overdue after the expiration of a reasonable time after its issue. No general rule as to what is a reasonable time can be laid down. The question depends upon the facts and circumstances of the particular case. Statutes in some states provide that demand paper shall be deemed overdue after a certain time and not before.

§ 319. **Burden of proof.**—One who has an apparent title to a bill or note is presumptively a bona fide holder for value without notice, and it lies upon the defendant to prove the contrary. But if, at the trial, it appears that the issue or subsequent transfer of such bill or note was tainted with fraud, duress, or illegality, the holder must show that he, or the party under whom he claims, is or was a bona fide holder for value. The reason of this rule is, that where one procures a bill or note by violence or fraud, he will transfer it to a confederate to recover for him what he could not recover for himself.

CHAPTER XX.

PRESENTMENT FOR PAYMENT.

Proceedings Upon Dishonor.

§ 320. **In general.**—We have already seen that the drawer of a bill warrants its acceptance and that the failure of the holder to present it for acceptance will, in certain cases, release the drawer as well as the indorsers, if any there be. Further than this an accepted draft or promissory note, and usually a bank check,[1] must be promptly and properly presented for payment to the acceptor, maker or drawee, otherwise the drawer and indorsers are released from their obligations to indemnify the holder in any form, in case of non-payment. The law requires demand of payment for reasons both of justice and policy. Drawers and indorsers have a right to expect that the paper will be honored by those whose duty it is to honor it, and if they are called upon to indemnify the holder he must show that he has made proper efforts to secure payment or acceptance from those whose primary duty it is to pay or accept. Having established dishonor as a fact, the holder must notify those to whom he would look for indemnity in order that they may seek indemnity from those liable to them. What bills must be presented for acceptance and the requisites of such presentment have already been discussed. If acceptance is refused the proceedings are the same as upon dishonor by non-payment.[2]

[1] *Post*, § 351.
[2] *Post*, § 329, *et seq.*

§ 321. **By whom presentment for payment must be made.**—The holder of a negotiable instrument, or any person having authority to act as his agent, may present it for payment. But where the paper is payable to bearer or indorsed in blank, the drawee, acceptor or maker may assume that the person in possession has title, and if he honestly pays the money to the holder he can not be compelled to pay again to one who lost it or from whom it was stolen.

Where the holder is dead when the paper falls due presentment must be made by his personal representatives. If there be none at that time they may present the paper within a reasonable time after their appointment.

If the instrument is one that requires protest, as is the case with foreign bills of exchange, presentment must be made by a notary public.

§ 322. **To whom presentment must be made.**—Presentment for payment must be made to the drawee or acceptor of a bill, or the maker of a note, or to an authorized agent, While the holder should, if possible, see the maker, drawee or acceptor, in person, if the paper is payable at a specified place and the party liable to pay can not be found there, he may present the paper to any suitable person found on the premises. If no such person can be found, the paper may be treated as dishonored.

Presentment to one partner is presentment to the firm. If the paper is signed by several who are not partners, presentment should be made to all.

If the maker, acceptor or drawee is dead, presentment should be made to the executor or administrator, if there is one, otherwise it should probably be made at the former residence of the deceased.

§ 323. **Place and hour of presentment.**—Where the paper is payable at a particular place, presentment at that place is sufficient though there is no one there to make payment. No further search or inquiry is necessary.

If the paper is payable generally, presentment should be made at the place of business of the drawee, acceptor or maker, and then at his residence. If, after diligent search and inquiry, the party or his place of residence or business can not be found, the paper may be treated as dishonored and the drawers and indorsers notified accordingly. If the presentment is to the maker or acceptor, personally, it would probably be sufficient wherever made, provided the refusal to pay was based upon some other ground than that the presentment was made at an improper place, as, for example, on the street.

Presentment at a place of business should be made during business hours. Presentment at a place of residence should be made before customary bedtime. Presentment at a bank should be made during customary banking hours.

§ 324. **Day of presentment.**—No presentment is necessary to charge the maker of a note or the acceptor of a bill, for their liability is absolute and unconditional. As against drawers and indorsers, however, a bill or note must be presented upon the precise day of maturity. Presentment upon an earlier date is wholly without effect, and so of presentment at a later day unless circumstances are such as to excuse the delay.[1]

§ 325. **Computation of time—Days of grace.**—Bills of exchange or negotiable promissory notes payable on a certain future day are not really payable upon that day. By mercantile custom in England, and generally in this country, such paper is due three days after the date fixed by its terms. These extra days are called "days of grace."

But by statute in some states days of grace have been abolished, and the wisdom of retaining the common law rule allowing them is questionable. In any case, if the paper be expressly "payable without grace," none will be allowed. Paper due on demand

[1] *Post*, § 343.

is not entitled to grace, nor is non-negotiable paper in most states, nor a bank check. But bills due at sight are usually entitled to grace, except where grace has been abolished by statute.

If the last day of grace falls on Sunday or a legal holiday, the paper is due and demand must be made on the preceding business day, except in a few states, where the paper is due by statute on the succeeding business day.

In computing time upon bills and notes, the word month means calendar month, and a bill payable two months after date, dated March 10, 1889, would mature without grace on May 10, 1889, and with grace on May 13. If paper is payable so many days after date or sight, the day of the date of acceptance is excluded, so that a note dated March 1, payable in thirty days, would be due without grace March 31; with grace on April 3.

§ 326. **Same—Paper payable on demand.**—Bills and notes payable on demand must be presented for payment within a reasonable time, otherwise the drawer and indorsers will be released. What is a reasonable time depends, in general, upon the facts and circumstances of each particular case. In the case of bills of exchange demand should be made at once, but in the case of interest-bearing notes a year might not be too long.

§ 327. **Formalities of presentment.**—Except when the paper is lost or destroyed, no valid presentment for payment can be made unless the party making presentment has the paper with him ready to deliver up to the party paying, for the latter is entitled to have it not only as a voucher of payment, but to prevent its subsequent negotiation. Ordinarily the paper should be exhibited to the party on whom demand is made.

§ 328. **Same—Lost bill or note.**—If the bill or note be lost or destroyed, presentment must be made by a copy of it with an offer of indemnity against its

appearance in the hands of a subsequent bona fide holder. In all states, however, the holder of a lost bill or note may recover thereon against any party whose liability has become fixed, by giving to the latter a proper indemnity against the possibility of a subsequent recovery by a bona fide holder for value.

Proceedings Upon Dishonor.

§ 329. **Notice—Necessity.**—If the drawers and indorsers of a bill or note are to pay it, they must be duly notified of its dishonor, whether by non-acceptance or non-payment, in order that they may know of the dishonor and the extent of the liability with which it has burdened them, and take such steps as may seem necessary to obtain indemnity from parties liable to them. The drawer of a draft or the indorsers of commercial paper generally are absolutely released by the holder's neglect or delay to make demand and give notice, and this is true whether they are actually injured or not. Mere knowledge of dishonor is not equivalent to notice and will not supply the place of it.

§ 330. **Who should give notice.**—Ordinarily the notice should be given by him who is the holder of the paper at the time dishonor takes place, or some one by his authority and on his behalf. Notice by a mere stranger is without effect.[1]

§ 331. **Who entitled to notice.**—As the acceptor of a bill or the maker of a note are primary debtors who must know their own defaults, they are not entitled to notice of dishonor. But the liability of the drawer and indorsers is conditional upon prompt demand and due notice of non-payment and non-acceptance.

Notice to one partner is notice to the firm, and notice to any agent authorized to receive it is notice to

[1] See, also, *post*, § 333.

the principal. But if there are joint indorsers not partners, notice must be given to all.

§ 332. **The time of notice.**—Where the parties live in the same place notice may be given on the day of maturity, provided the maker, acceptor, or drawee, has distinctly refused payment on that day; otherwise notice must be given on the following day. If the notice is sent to the place of business of the drawer or indorser it must be left there during business hours. If it is sent to his residence it must be left there before bed-time.

Where the parties reside in different places, the notice may be sent by mail. It may be mailed on the day of maturity if there has been a distinct refusal of payment, otherwise it must be sent on the following day, provided the mail on that day does not leave at an unreasonably early hour. Before seven in the morning has been held to be an unreasonable hour, and if there is only one mail on that day, which leaves before seven, the holder may send notice on the following day. If there is more than one mail on the day after dishonor, the last mail will be early enough. If no mail leaves on the day after dishonor, then notice must be sent by the earliest mail thereafter. If the day succeeding dishonor be a Sunday or legal holiday, notice may be sent on the next business day.

Each party notified has the same time within which to notify those liable to him as is allowed to the holder to notify his immediate indorser.

§ 333. **To whose benefit notice inures.**—If the holder notifies the drawer and all the indorsers, he may, at his leisure, determine which to sue, and the notice which he gives will fix the liability of every party upon the paper to every party below him who pays it. If the holder notifies only his immediate indorser, and none of the others are notified within the time fixed by law, the others are released. But if an indorser who is duly notified gives notice in

turn to any or all above him, their liability both to him and to the holder is fixed, and so where each successive indorser takes his day. The safest course, however, is for the holder to notify the drawer and all the indorsers in the first instance.

§ 334. **Mode of giving notice—Notice by mail.**—If the party to be notified actually receives notice in due time, it is immaterial whether it is oral or in writing, by post or by private messenger. The mode of giving notice is only important where the notice, though sent, was delayed or never received.

Where the drawer or indorser to be notified resides in the place where the paper was dishonored, notice by mail is not sufficient unless actually received in due season. The notice should be sent by private messenger or be delivered by the holder in person. But in large cities where there is a daily delivery of mail at houses and offices by regular carriers, the mail is probably a proper medium for the transmission of notice, provided the notice is mailed in such season that it would be delivered on the day of mailing, in due course.

When the parties to be notified reside in a place other than that in which the holder resides and the dishonor takes place, a notice properly addressed and promptly mailed, will bind the drawer and indorsers, though it be delayed or is never received. But if there is any mistake in the address, or the postage is not prepaid, the notice will be insufficient, unless actually received in due course.

§ 335. **To what post-office notice must be sent.**—If the drawer or indorser has given explicit directions as to where the notice of dishonor shall be sent, these must be followed without regard to his place of residence or business. And where the drawer or indorser adds an address, this is treated as direction to be followed in the mailing of notice. As a general rule, in the absence of express directions, the notice

may be addressed to the post-office where the drawer or indorser resides.

§ 336. **Of the form and requisites of notice.**—If the notice is delivered orally to the drawer or indorser, it is sufficient, though meager, for the latter may ask the holder or his messenger for fuller information. But as the object of notice is to apprise the party notified that the paper is dishonored and that he is looked to for payment, every written notice should contain, (1) a sufficient description of the bill or note,[1] (2) the statement that it has been presented for acceptance or payment, as the case may be; (3) a statement that it has been dishonored; (4) a statement that it has been protested, if such is the case; (5) a statement that the holder looks for payment to the party notified.

It must be stated that the paper was presented and that it was dishonored. The statement that the bill or note has not been paid is alone insufficient, and so of the statement that the paper has been presented without stating its dishonor.

§ 337. **Protest defined.**—Every foreign bill of exchange must, if dishonored, be protested, and if not protested, the drawer and indorsers are released. No show of diligence, of whatever character, will supply the place of protest. In its popular sense "protest" includes all the steps necessary to charge the drawers and indorsers of a bill or note. In its technical and restricted sense it means the formal and official act of a notary public in establishing and certifying to the dishonor of a bill or note.

§ 338. **Why protest required.**—The law merchant required a protest only in cases of foreign bills of exchange. Such bills being dishonored abroad, the drawer, who resides elsewhere, would have to rely solely upon the representations of the holder touching the presentment and dishonor of the bill. A

[1] A correct copy of the paper itself will answer all purposes of description.

certificate of protest, under seal of a notary public, an officer recognized by the law of all commercial nations, is prima facie evidence of the presentment and dishonor. While it may be contradicted, yet, until contradicted, its recitals will be taken as true as to all facts within the notary's official duty. It thus dispenses with the necessity of relying upon the representations of the holder, or of calling witnesses from abroad to testify as to the fact of dishonor.

§ 339. **What paper requires protest.**—Statutes in many states have sanctioned the protest of all kinds of commercial paper, and declared that certificate of protest to have the same effect as in the case of foreign bills. But unless the local statute expressly requires protest of other instruments in order to charge the drawer or indorsers, none but foreign bills of exchange need be protested; and if the local law neither requires nor sanctions the protest of inland bills or promissory notes, a protest of such paper is valueless. But it is held by some authorities that a note made in one state or country and indorsed in another must be protested in order to charge the indorser on the ground that he is, in effect, the drawer of a new bill. By the weight of authority, non-negotiable paper need not be protested.

§ 340. **Who should make the protest.**—Protest must be made by a notary public, and the same notary must take all the steps upon which the certificate of protest is based. But if there be no notary at the place of presentment, any respectable citizen may make the protest in the presence of two witnesses.

§ 341. **Noting the protest.**—The notary may make out his certificate of protest on the day of dishonor, and must do so, unless he notes the protest forthwith. But if on the day of dishonor he makes a signed memorandum on the back of the paper or otherwise, of the date and fact of dishonor, including the demand, the refusal of payment or acceptance and the reasons for the same, if any, and his

charges, he may make out his certificate at a later day. Making the memorandum described is called noting the protest; making out the certificate of protest is called extending the protest.

§ 342. **The certificate of protest.**—The certificate must contain a true statement of all the facts constituting the dishonor of the bill. But if the facts are correctly stated in the noting of the protest, a new certificate may be made in conformity with those facts, in case the first one is incorrect. The certificate must contain: (1) A description of the instrument or a copy of it. (2) A statement of presentment and demand of payment or acceptance, together with the date of such presentment and demand. It is advisable but not necessary to give the hour. (3) If the paper is payable at a particular place, a statement that demand was made at that place. (4) A separate statement both of presentment and demand. (5) A plain and unequivocal statement that payment or acceptance was refused. (6) A statement of the names of the parties to whom presentment was made. If no person could be found to whom presentment could be made, a statement of that fact will suffice. (7) Finally, the certificate must be sealed with the official seal of the notary making the protest. Though it is not necessary for the notary to give notice of dishonor, it is customary for him to do so. If he gives notice his certificate may show the fact.[1]

§ 343. **Excuses for the lack of presentment, notice and protest.**—Any person, for whose benefit or protection the law requires demand, notice and protest, may waive his rights. Thus, a drawer or indorser who writes over his signature, "Demand, notice and protest waived," will be held absolutely

[1] The certificate is not, unless by statute, evidence that notice was given as therein certified, as it is not, at common law, the duty of the notary to give the notice. But statutes often provide that the certificate shall be evidence of the fact of notice, if the certificate so states.

liable if the paper is dishonored. If the waiver is in the body of the instrument it binds all parties; if it is above the signature of a single indorser, it affects him only.

A waiver of notice merely is no waiver of demand. But a waiver of protest is held to include a waiver of demand and notice, at least in the case of a foreign bill, though some cases hold it a waiver of demand only in the case of an inland bill.

The breaking out of war between the country of the holder and that of the party to whom presentment should be made or notice given, will excuse delay in presenting a bill or note and giving notice of dishonor until after hostilities have ceased. Even though the parties are friendly, still, if communication is dangerous or impossible because of the operation of war, or because of an insurrection or other social or political disturbance, or because of the prevalence of malignant or contagious disease, demand and notice are excused until they can be safely made or given. The sickness of the holder or a public calamity, rendering demand and notice impossible, excuse delay in making presentment and giving notice. But whenever the impediment is removed, whether it be war, riot, flood, epidemic, or whatever else, the holder must then proceed with diligence to make demand and give notice. If notice only is impossible owing to any of these causes, demand is not excused.

CHAPTER XXI.

THE LAW PECULIAR TO CHECKS AND CERTIFICATES OF DEPOSIT.

§ 344. **Nature of deposit in bank.**—Funds deposited in the ordinary way with a banker become the property of the latter, who stands, like any other borrower, in the relation of a debtor to the depositor. The loan thus made and the debt thus created are evidenced by entries in a small book called a pass-book held by the depositor, and by entries on the books of the bank. This loan or debt the banker also agrees to pay at such time, in such sums and to such persons as the depositor shall order or direct. Such order or direction is commonly given by check.

§ 345. **Check—Definition and nature.**—A check may be defined as a brief order or draft drawn by a depositor upon his bank or banker, payable on demand. While checks are essentially inland bills, and negotiable in like manner whenever they contain the ordinary elements of a negotiable contract, they differ from the latter instruments in several respects. They have no days of grace and require no acceptance distinct from prompt payment, and the drawer has no reason to complain of delay in presentment unless upon the intermediate failure of the bank.[1]

§ 346. **Same—Payable on demand without grace.**—All the authorities agree that an instrument is never a check unless drawn upon a bank or banker. By the weight of authority, also, the order must be

[1] For the form of a check see *ante*, § 261.

payable on demand, and an instrument in the form of a check, but payable after date or sight, is not a check, but a bill of exchange, and as such is entitled to grace, even though it be drawn upon a bank or banker. Presentment before the days of grace have expired is therefore premature, and not sufficient to charge drawers and indorers.

§ 347. **Can the checkholder sue bank?** — By the great weight of authority a checkholder can not sue the bank, even if it has funds in its hands belonging to the drawer, unless the check was previously presented and certified. But in a few states a check is regarded as an equitable assignment *pro tanto* of the fund upon which it is drawn, and the bank is bound to retain sufficient funds to meet the check the moment it is notified that it is outstanding, and will be liable to an action by the checkholder upon a subsequent refusal to pay him.[1]

§ 348. **Certification.**—Though a check is not subject to be accepted in the ordinary sense, it may be certified. Certification as between the bank and the checkholder is substantially the same as an acceptance. By certifying a check the bank becomes the principal debtor, and bound to hold sufficient funds to meet it whenever it is presented. Certification is usually accomplished by writing or stamping the word "Certified" or "Good" on the face of the check, with the date and the signature of the proper bank officer.

§ 349. **Certification releases drawer.**—The drawer warrants payment provided the check is promptly presented and payment demanded. He does not warrant certification or acceptance. If the holder procures the check to be certified, the drawer and indorsers are released. In this the certification differs from the acceptance of a bill, for in the case of a bill the drawer, after acceptance, remains bound

[1] This rule is said to prevail in Illinois, Iowa, Kentucky and South Carolina.

for its payment. But it is generally held that where the drawer himself procures the certification he is bound for its payment in the same way as the drawer of a bill. One who indorses a certified check is bound like the indorser of an accepted bill.

§ 350. **Who may certify.**—Any officer empowered to do so by the charter or by-laws of the bank may certify checks. Ordinarily this power resides in the directors and cashier. It is held to be vested in the teller by general usage, but not in the assistant cashier. A bank officer has no power to certify his own check.

§ 351. **Presentment and notice.**—The rules with regard to demand and notice are substantially the same as to checks as in the case of notes and bills. In order, however, that any delay in presentation and notice shall discharge the drawer, he must have been prejudiced thereby, as through the intermediate failure of a bank, though a similar delay in the case of a bill will discharge the drawer, even though he was not really injured thereby. But indorsers of a check are discharged by delay, whether they are actually injured or not.

A reasonable time for the presentment of a check, in the absence of special circumstances, has been quite accurately defined by the courts.

Where the payee receives the check in the same place with the drawee bank, he must present it before the close of banking hours on the day upon which he receives it or on the following day. Where the check is received on Saturday, the payee has until the close of banking hours on Monday to present it.

Where the payee receives the check in another town, he has all of the next secular day to forward it for collection, and the party to whom it is sent for collection has all the next day after it has reached him in due course of mail to make the presentment.

The same excuses for delay in presentment and

notice are usually available in the case of checks as in the case of other commercial paper.

§ 352. **Overdue checks.**—A check is said to be overdue or stale, so as to let in equitable defenses against the holder, when it has been so long outstanding as to arouse the suspicions of a reasonably prudent man in the light of all the circumstances of the case. A delay of one month has been held not to render a check overdue. On the other hand, it has been held that a delay of five days would render it stale in view of surrounding circumstances.

§ 353. **Payment of checks—Duty of the bank.**—The bank is bound in favor of the depositor to pay his checks when properly drawn against funds, and is liable to an action if it refuse so to do. But it is under no such obligation to the checkholder, except in those states where a check is held to operate as an equitable assignment *pro tanto* of the fund on which it was drawn. Unless a check is held so to operate the drawer may countermand it at any time before it is actually paid or certified, and the bank can not lawfully pay in the face of such countermand. Except where the check operates as an equitable assignment *pro tanto* the death of the drawer revokes it, though the bank is protected if it pays in ignorance of death. Wherever a check operates as an equitable assignment the bank may pay checks drawn before, but presented after, the attachment of the drawer's deposit. Elsewhere the bank can not, after attachment, pay a check drawn upon an attached deposit, even though it was drawn before the attachment was levied, unless such check was previously certified.

§ 354. **Forged checks.**—A bank is bound to know the signature of its depositor, and can not charge against him money paid on his forged signature, though it may charge against him payment made upon a raised check, provided his negligence in failing to take ordinary precautions in filling up blanks facilitated the forgery and led the bank into error.

It is generally laid down that if a bank pays or certifies a forged check, it is thereby estopped to show the forgery of the drawer's signature as against an innocent holder for value. A bank is always estopped to show forgery of the drawer's signature as against one who took it bona fide and for value after certification. But it seems settled that payment or certification of a check warrants the genuineness of the signature only and not the body of the check, and a bank which pays a check that was raised either before or after certification can recover the excess from the holder, provided it acts promptly upon discovering the error.

Certificates of Deposit.

§ 355. **Form of nature.**—Certificates of deposit issued by banks and bankers are commonly in the following form:

PACIFIC NATIONAL BANK.

$1000.00. BOSTON, Mass., June 1, 1894.

This is to certify that Charles G. Ward has deposited in this bank one thousand dollars, payable to the order of himself upon the return of this certificate properly indorsed.

C. B. WILKES,
Cashier.

The courts, almost without exception, have held certificates of deposit to be in effect promissory notes, and negotiable as such, provided the usual elements of negotiability are present. Those who indorse them are liable in the same manner and upon the same conditions as the indorsers of a note.

§ 356. **Demand—Statute of limitations.**—Even where the certificate is expressly payable "upon the return of this certificate," or similar language is used, it is held by many courts that no demand in fact is necessary before a suit against the bank, and that the statute of limitations runs from the date of the instrument, as in the case of an ordinary note

payable on demand. But it is the rule in some states that the statute of limitations runs only from an actual demand of payment, and that such demand must precede suit.

CHAPTER XXII.

AGENCY.

I. Agents defined and classified as { a. General. b. Special. c. *Del credere*.

II. Appointment of agents { a. By writing, sealed. b. Expressly without seal. c. By implication and estoppel. d. Ratification.

Duties.

III. Duties of agent. { a. Loyalty to trust. b. Duty to account. c. Skill and diligence.

IV. Rights of agent. { a. To compensation. b. To reimbursement. c. Of lien and stoppage in transit.

V. Effect..... { a. Principal and third parties. b. Agent and third parties.

VI. Termination of agency. { a. By act of parties. b. By operation of law.

Nature and Formation.

§ 357. **Definition and nature.**—Agency is the legal relation founded upon the express or implied contract of the parties, or created by law, by virtue of which one party, the agent, is employed and authorized to represent and act for the other, the principal, in business dealings with third persons. The affairs of modern society are so manifold and complex that very few persons are able to transact all their business, and accomplish all their purposes, without employing others to represent and act for them and in their stead. It is a rule of law, therefore, that whatsoever one legally competent may do in his own right, he may employ an agent to do for him, and, as a correlative of this, that whatsoever is done by the agent,

within the scope of the power conferred upon him, is, in law, the act of the principal.

§ 358. **Classes of agents.**—Agents are divided into a variety of classes, depending upon the nature and extent of their authority, the character of their calling, and the obligations they assume.

As to the extent of the authority conferred upon them, agents are either *general* or *special*.

A general agent is one authorized to transact all the business of his principal of a certain kind or in a certain place. A special agent is one authorized to act only in a specific transaction.

As to the character of their calling, agents are classed as professional and non-professional. Among the former are factors or commission merchants, who make a business of selling goods consigned to them or put in their possession for a commission; brokers, who bring parties together or bargain for them in matters of trade and commerce without having possession of the property which is the subject of the agency; auctioneers, who sell goods at public competitive sale, and attorneys at law, who act both as officers of the courts and as the agents and representatives of their principals (clients) in conducting law suits, and in other matters requiring skill and knowledge in the law.

Agents are either paid or gratuitous, and paid agents are *del credere* or not *del credere*. A *del credere* agent is one who undertakes, for an extra compensation or commission, that the party to whom he sells the principal's goods will pay for them. The contract is not one of guarantee and need not be in writing.

§ 359. **Who may be principal or agent.**—Any person legally competent to act in his own right may act through an agent, and any person not so competent is equally incompetent to act through an

agent. Any person may be an agent except a lunatic, imbecile, or child of tender years.

§ 360. **The appointment of agents.**—As a general rule one can become an agent only by the will of the principal, unless the latter has so conducted himself as to lead third parties to believe that he has given an authority which he never conferred in fact.[1]

§ 361. **When authority must be sealed.**—By the common law an agent, in order to bind his principal by an instrument under seal, must have authority under seal. But this rule is subject to the following exceptions:

(1) An instrument sealed in the presence of the principal, and by his authority, binds him, though the authority be oral or by unsealed writing.

(2) If the instrument which the agent executes under seal, but without sealed authority, would have been valid and effectual without a seal, the principal will be bound by it as a simple contract, the seal only being treated as unauthorized.

A sealed authority is technically termed a power of attorney, and the agent to whom it is given is called an attorney in fact.

§ 362. **Informal writing—Parol.**—In some cases statutes require a written authority merely for the doing of certain acts not themselves requiring the execution of a sealed instrument. In these cases no seal is necessary, though its employment can do no harm. A letter or telegram suffices.

And an agent may be authorized without writing to bind his principal by written contracts, even in cases where the latter would not be bound without a writing, as under the 17th section of the statute of frauds, the statute not in terms requiring a written authorization. Except as stated above, authority may be conferred expressly by word of mouth, or by implication from the acts of the principal.

[1] *Post*, § 363.

§ 363. **Agency by implication — Estoppel.** — The principal is not responsible for such powers alone as he has in fact conferred, but for such an appearance of power or authority as his acts, representations, admissions or silence create. As against third persons who are misled, the principal will be estopped to show that no authority was actually delegated. Thus, where a husband allows his wife to deal with tradesmen for the ordinary supplies of the household, he will be estopped as against those who contract with her on the faith of the authority thus apparently created, to show that she is unauthorized in fact. So, a father who had repeatedly recognized his liability upon notes signed with his name by his son, was held estopped to show lack of authority for a subsequent signing, as against one who dealt in good faith on the basis of the previous apparent authority. So, one who stands by and permits another to make a contract for him as his agent, without disclosing his lack of authority, may be held liable on like grounds.

§ 364. **Ratification.** — Whatever is done without the actual authority of the principal, or without an appearance of authority for which he is responsible, does not bind him, unless he subsequently, and with full knowledge of the facts, adopts the act and recognizes it as his own. But if the principal ratifies and adopts the unauthorized dealings of one who assumes to act as his agent, he will, as a rule, become bound in the same manner and to the same extent as if such dealings had been authorized from the first.

The doctrine of ratification applies both to contracts and to torts. But the act to be ratified must have been done by one who assumed to act as the agent of the party ratifying, and not merely for himself or for a stranger.

Neither is the principal bound by his ratification, unless it be made with full knowledge of all the material facts, or unless, being put upon inquiry as to the facts, he chooses to ratify without knowledge.

A principal can not ratify so much of his agent's unauthorized act as he deems beneficial, and avoid the rest. He must ratify the whole or none. His attempt to ratify in part may amount to a ratification of the whole.

§ 365. **What constitutes ratification.**—It is a general rule that an unauthorized act must be ratified by the same means necessary to confer authority to do it in the first instance. Hence, if sealed authority was indispensable, the ratification must be under seal, and if written authority was required, written ratification must be shown.

In other cases ratification may be informal, by spoken words, or implied from conduct. So, if one with full knowledge of all the facts or without inquiry as to them, takes the benefits of an unauthorized act or contract done or made on his behalf, he will be bound to all the consequences of such act or contract, upon the ground of an implied ratification.

CHAPTER XXIII.

AUTHORITY—ITS NATURE AND EXTENT—HOW EXECUTED.

§ 366. **In general—Evidence.**—The purpose of appointing an agent is to clothe him, at least for a time, with a portion of the powers with which nature and the laws of society have invested the principal. If the evidence is disputed, the third party, in order to establish a right against the principal, must show by competent evidence: (1) That the principal did, as a matter of fact, confer authority upon the agent, in accordance with the rules previously laid down; or, (2) that the principal so conducted himself as to lead the third party reasonably to believe that authority was actually conferred; or, (3) that the principal has voluntarily ratified the act of the agent.

§ 367. **General and special authority.**—A distinction is usually made between general and special agents. A general agent is one who is empowered to transact all the principal's business of a particular kind or in a particular place. A special agent is one who is to act only in a specific transaction. Thus, one authorized to conduct B's business as a dealer in dry goods, or to manage his factory in Chicago, would be a general agent. But one authorized to sell a particular piece of land or to buy a specific chattel, is a special agent.

The difficulty of describing each act which a general agent may do usually makes it impossible, even when the authority is expressly conferred, to avoid the use of general terms which leave much to be in-

ferred from the nature of the business in which the agent is employed and the character in which his principal holds him out to the world.

If the agency is special, much less is left to implication, for the limits of the authority being less, its scope is easier to determine, and inquiry is more readily suggested. Generally, therefore, the authority of a special agent must be strictly pursued, otherwise the principal will not be bound.

§ 368. **Usage as an element.**—Where the agent is actually or apparently authorized to do an act or transact a business, with respect to which a well defined and generally known usage exists, third parties may presume, in the absence of instructions limiting the agent's authority and known to them, that the agent has power to discharge his trust as the usage warrants.

§ 369. **Instructions limiting authority.**—The principal may, from time to time, by special instructions, restrict the authority of his agent within such limits as he sees fit. While these instructions will bind both the agent and third persons from the time they have notice of them, they will not affect the rights of third third parties without notice who have dealt with the the agent in good faith within the scope of his apparent authority.

§ 370. **Public agents.**—The foregoing rules touching the actual and apparent or ostensible powers of agents are applicable, for the most part, to private agents only. The authority of public officers and agents is a matter of public law or record, of which all persons are bound at their peril to take notice. Private persons are liable to the extent of the powers they have apparently conferred upon their agents, while the government is responsible to the extent only of such powers as it has actually conferred.

§ 371. **Construction of authorities.**—The general rules and principles governing the construction of powers do not differ from those which apply to the

interpretation of contracts. The meaning of general words and expressions in an instrument conferring powers will be limited to the manifest objects for which the agency was created, whether these are expressly disclosed by the recitals or are apparent from the whole instrument. And the power will be held to relate to the principal's ordinary and private business unless a contrary intent is manifest.

§ 372. **Power to do particular acts—To sell land.**—A power "to act in all my business, in all my concerns as if I were personally present, and to stand good in all my land and other business," gives no power to sell land. A power to sell land gives no power to mortgage it, nor to exchange it for other property, nor to sell on credit. A power to sell on credit gives implied authority to sell on reasonable credit only.

§ 373. **Power to sell personal property—Pledge.**—The mere fact that one has possession of personal property is not alone sufficient evidence that he is the owner of it, or that he has authority to dispose of it by sale or pledge. If the party in possession is not the owner in fact, and has no authority from such owner to dispose of it, not even a bona fide purchaser or pledgee for value will acquire any right as against the true owner.

But if an agent, entrusted by his principal with negotiable instruments payable to bearer or indorsed in bank, transfers them to a bona fide purchaser or pledgee for value, the latter may hold them against the principal, even though the agent acted without authority, and the same is true where other securities are entrusted to an agent, so indorsed, made out, or assigned, as to lead to the belief that the agent is their real owner.

Innocent pledgees from factors or mercantile agents are sometimes protected under special statutes known as factors' acts.

It may be stated generally that an agent entrusted

with the custody of goods and authorized to sell and deliver them, has implied power to receive payment at the time of the sale and as a part of the same transaction. But an agent who is charged neither with the custody of the goods nor with the duty to deliver them, as in the case of a broker or mere traveling salesman or drummer, has no implied authority to receive payment, and an agent who sells on credit can not subsequently receive the price unless specially authorized by usage, or the language or conduct of the principal.

As a general rule an agent has no authority to sell on credit, nor to warrant the quality of the thing sold, unless there be a valid usage of trade to that effect, as in the case of a factor, or he is specially authorized to do so.

§ 374. **Authority to purchase.**—An agent authorized to purchase, and supplied with funds, has no implied authority to buy on credit, unless such is the usage of the trade in which he is employed. But if an agent, authorized to buy, is not furnished with necessary funds, he has implied power to buy on credit.

§ 375. **Authority to receive payment.**—Authority to receive payment for the principal can not be presumed from the mere possesssion of a bill or note payable to the order of the principal and unindorsed, nor from the bare possession of a bill or statement of account, though made out in the handwriting of the principal and upon his bill-head.

Where a principal has made a loan through an agent and left the securities in his hands, authority to receive payment may be implied.

§ 376. **Power to issue and indorse negotiable paper.**—Authority to make and indorse negotiable paper is not readily implied. Unless conferred expressly it seldom exists. Authority to bind the principal by bill or note may be inferred from frequent recognition by the principal of the agent's authority

to do so. Authority to draw a bill does not imply authority to indorse or accept one.

§ 377. **How the authority should be executed—Defective execution.**—We have seen how an authority may be conferred and something of its nature and extent. We have now to see how authority must be executed in order to bind the principal rather than the agent, or no one at all.

It is well settled that the agent, in order to bind his principal by an instrument under seal, must so execute it that it purports, upon its face, to be made, signed and sealed in the name of the principal. Even though the agent describes himself as an agent, or adds the words agent or attorney after his name, if the words of grant or covenant import upon the face of the instrument to be his, and the seal purports to be his, the agent will be bound, and not the principal. Parol evidence will not be admitted to charge the principal by showing that he, and not the agent, was intended to be bound, unless the contract in question would have been valid without a seal.

The technical nature of the rule that the deed must be in the name of the principal, and the unjust consequences which often follow its application, have led to its being somewhat limited or relaxed in its operation in some courts. We have no space, however, to further discuss this subject, and therefore lay down the safe rule, that in executing a contract for his principal, whether sealed or simple, the agent should write it throughout as the contract of the principal, and sign it with the principal's name, adding thereafter the words, "By his attorney, A B," or, "By his agent, A B," or, "By A B, his attorney or agent."

CHAPTER XXIV.

THE EFFECT OF THE RELATION.

Duties and Liabilities of Principal and Agent to Each Other and to Third Parties.

§ 378. **General rule.**—Naturally we entrust the management of our business and affairs to those in whose capacity, fidelity and integrity we have special confidence. The law protects this confidence zealously for obvious reasons of justice and public policy. Whenever the agent violates his duties or obligations to his principal, therefore, and any loss or damage thereby falls upon his principal, he is bound to make the latter full indemnity.

§ 379. **Agent must be loyal to his trust.**—The agent will not be permitted to reap a secret benefit at the expense of his principal by dealing directly or indirectly in the business of the agency for his own profit, nor to place himself in a position antagonistic to his principal and then retain any benefit or enforce any contract which he has thus been enabled to obtain at the expense of his employer. Thus, an agent to buy can not sell his own goods to the principal, nor can an agent to sell, himself become the purchaser, unless a full disclosure of all the facts may be said to put the parties at arm's length. In such cases the law will not investigate the actual fairness or unfairness of the transaction, but leaves it to the principal to say whether he will ratify or avoid it. So, all profits made and advantages gained in the course of the agency, beyond the agent's salary or commissions, belong to the principal, whether made in the performance of his duties or in violation of his trust.

§ 380. **Agent must obey instructions.**—It is clearly the duty of the agent to obey all reasonable and lawful instructions. If he disregards them he is liable to his principal for whatever damages ensue, and habitual or flagrant disobedience may warrant his discharge.

Departure from instructions may be warranted in cases of sudden emergency or necessity not due to the negligence or default of the agent. But before departing from them the agent must communicate with his principal, if possible, and secure a modification of his orders.

§ 381. **Must keep accounts—Commingling goods or funds.**—The agent must keep regular accounts, and preserve the necessary vouchers, and must be ready, whenever reasonably requested, to make and present to his principal a full statement of his dealings.

The agent must not so mingle the goods or moneys of the principal with his own as to render them incapable of being distinguished. If he does so, either the principal will take the whole, or any loss occurring to the fund will fall upon the agent. Thus, he should, in depositing his principal's moneys in bank, either deposit them in his principal's name, or indicate in some other way, that they belong to the principal. If he does so, having used due care to select a safe and solvent bank, any loss of the funds will fall upon the principal. But if he deposits funds in his own name and account he will be absolutely liable if they are lost by the failure of the bank.

§ 382. **Agent must use skill and diligence.**—It is the duty of every agent to bring to the performance of his undertaking, and to exercise in such performance, that degree of care, skill and diligence which the nature of the undertaking and the time, place and circumstances of the performance justly and reasonably demand. It is also his duty to give

timely notice to his principal of every matter affecting the agency which it is material for the principal to know in order to protect his interests.

Right of Agent Against Principal.

§ 383. **Agent's right to compensation.**—The relationship of principal and agent, like that of master and servant, is usually one of contract. A special contract as to the compensation to be paid will of course control. If nothing be said about pay, a reasonable compensation will be implied, unless it was expressly agreed that the agent should serve gratuitously, or the services were such as friends or relatives perform without pay.

§ 384. **Forfeiture by agent.**—While the fraud or gross negligence of the agent may result in the entire forfeiture of his right to pay, his slight negligence gives the principal a mere right to deduct from his compensation the damages caused thereby.

§ 385. **Upon revocation by principal.**—If the principal has the right to revoke the agency at any time, and does so, the agent may usually recover the value of whatever services he rendered up to the time of his discharge, but nothing more. This is always so where the principal receives the full value of the agent's services as they are rendered.

Where the agent has faithfully done all that he undertook to do, his entire compensation is earned, though the principal refuses to take the benefits of his service.

§ 386. **Abandonment by agent.**—If the agent or servant, hired for a definite term, leaves the service without justification or excuse, he can not, according to the weight of authority, recover compensation even for what he has done. By a more liberal rule in some states the agent is permitted to recover the reasonable value of his services up to the time of

leaving, less the damages caused the principal by the breach of contract.[1]

§ 387. **Agent for fixed term—Revocation wrongful.**—An agent hired for a fixed term and discharged against his will has a cause of action against the principal for the damages resulting from the breach of contract, unless his (the agent's) own misconduct warranted the discharge. If the discharge is wrongful the agent has a choice of remedies:

(1) He may treat the contract as rescinded and recover the actual value of the services rendered up to the time of his discharge, even though they be worth more than his stipulated salary.

(2) He may treat the contract as still subsisting and sue for the actual damages caused him by the breach of contract. When he sues, after the expiration of the term of the employment, his damages are prima facie his salary for the entire term. Where he sues before the expiration of the term of service, his damages are prima facie his wages up to the time of trial. From these amounts will be deducted all sums already paid the agent, all sums that he actually earned in other employments during the unexpired term, and all sums that he might have earned in any other employment of the same general nature and in the same locality during such unexpired term, had he used reasonable diligence to procure it.

§ 388. **Agent's right to reimbursement and indemnity.**—As the principal is entitled to the profits or advantages arising from the agency, he should bear its burdens. From this it follows that the agent is entitled to demand of his principal reimbursement for all advances, expenses and disbursements made and incurred in properly executing his lawful authority. Even where the agent took personal property by direction of his principal, believing that it belonged to the latter, and was afterward

[1] This rule seems to prevail in New Hampshire, Texas, Iowa, Indiana, Nebraska and Mississippi.

compelled to pay damages to one who proved to be the owner, he was held entitled to indemnity. But if the agent performs an act which he knows, or must be presumed to know, to be unlawful, he is answerable like other wrong-doers, and can claim no indemnity for the consequences of the wrong.

§ 389. **Agent's lien.**—A lien may be here defined as a right in one man to detain that which is in his possession belonging to another until certain demands of him, the person in possession, are satisfied. Possession by the party claiming the lien is, by the common law, essential to its existence.

Liens are of two sorts: (1) General. (2) Particular or special.

A general lien is the right to retain the property of another, coming to one in the course of an employment, as security for a general balance of account due in such employment.

A particular lien is the right to retain the property of another for charges or expenses incurred with respect to it.

Special or particular liens are given to all agents for all necessary and proper commissions, advances, disbursements and services in and about the property or thing entrusted to their agency.

But certain classes of agents have a general lien on the property of their principal coming lawfully into their possession in the course of their employment, as security for a general balance of account against their principals, unless by express contract or well defined local usage such lien is excluded. The agents commonly entitled to a general lien are factors or commission merchants, attorneys and bankers.

§ 390. **When agent may retain title or stop in transit.**—An agent who, under the authority of his principal, buys goods and pays for them himself, or binds himself for the price, may take title to himself and retain it until they are paid for by the principal,

or he may, even where he purchased them in the name of the principal, stop them in the hands of a carrier upon learning of the principal's insolvency.[1]

Liability of Principal to Third Parties.

§ 391. **In general.**—An agent who acts within the scope of his authority and in the name of the principal binds the latter and not himself. Even though the agent exceeds his authority, the principal is bound if he has by words or conduct clothed the agent with an apparent authority to do the act or make the contract in question. These rules are already familiar.

§ 392. **Undisclosed principal.**—But if the agent discloses neither the name of his principal nor the fact of his agency, it is clearly settled, in the case of simple contracts other than bills and notes, that the third party may accept the supposed state of affairs, and sue the agent, or he may accept the actual state of affairs and sue the principal, provided the principal has not, in the meantime, paid or settled with his agent. But if he elects to hold the principal, he must exercise his right of choice within a reasonable time after discovering his existence and identity. Neither can he hold both principal and agent, and if he has clearly elected to hold one, he can not afterward change his attitude and hold the other. And these rules apply, it seems, to cases where the fact of the agency was, but the identity of the principal was not, disclosed, provided the contract was not so framed as to lead to the conclusion that the third party intended to look solely to the agent.

§ 393. **What constitutes election.**—But the third party can only elect where he has knowledge of his choice, which knowledge must include both the fact of the agency and the name of the principal. So the

[1] *Post*, § 572.

mere commencement of an action against the agent when the principal is unknown will not prevent the third party from discontinuing it and commencing against the principal when discovered. But where the third party, knowing who is the principal, sues the agent, or takes his personal note without taking other steps indicating his intent to hold the principal, the principal can not afterward be held.

§ 394. **Agent's statements and admissions.**—While engaged in the business of the agency, and acting within the scope of his authority, the agent stands in the place of the principal. His statements, representations and admissions with reference to the business he is authorized to do, and while engaged in doing it, are therefore as binding upon the principal as if the latter had made them personally.

§ 395. **When notice to agent is notice to the principal.**—Notice to the agent, while acting within the scope of his authority, with reference to some matter to which the authority extends, is deemed notice to the principal, whether the agent communicates such notice to him or not.

§ 396. **Liability of principal for torts of agent.**—The authorized act of the agent is the act of the principal, and hence, whatever wrong the agent may commit by the express direction of the principal, is, in law, the wrong of the principal. Yet the rule is broader than this. Every person is bound to use due care in the conduct of his own business, whether he transacts it in person or through others, and the negligence of the agent or servant is imputed to his principal or master, provided the agent or servant was, at the time, acting within the scope of the business or employment entrusted to him; and this rule applies though the agent acted contrary to his express orders, or even, perhaps, with malice.

The principal is not responsible for the negligence or other wrong of his agent, done while acting in ex-

cess of his real or apparent authority and beyond the scope of his employment.

The principal is answerable for the false and fraudulent representations of his agent upon the same grounds as for other torts.

Liability of Agent to Third Parties.

§ 397. **Wrongful or unauthorized acts—Foreign or irresponsible principal.**—As a general rule an agent who contracts for and in the name of a disclosed principal, binds the latter and not himself, unless he specially agrees to be personally liable. But if he exceeds his authority so that the principal is not bound, the agent is personally liable, provided his act would have bound the principal had it been authorized. The agent's liability in such case is either upon an implied warranty of authority, where he believes himself authorized, or on the ground of fraud where he intentionally misrepresents his powers. No implied warranty of authority arises, however, where the agent fully and honestly discloses all the facts upon which his supposed authority is based.

Though an agent acting for a principal residing abroad is more readily presumed to pledge his own credit than when his principal resides here, if the clear intent of the contract is to bind the principal and not the agent, the principal only will be bound.

Where there is no responsible principal, the agent may be personally bound, as where he acts for a mere temporary society, meeting or club.

The agent is personally liable to third parties injured by his torts, even though he believed his act to be lawful. His knowledge of the wrongfulness of the act merely affects his right to claim indemnity from his principal.

CHAPTER XXV.

TERMINATION OF AGENCY.

§ 398. **In general.**—The relation of principal and agent may be terminated in three general ways: (1) By original agreement; (2) by act of the parties; (3) by operation of law.

By Original Agreement and by Act of the Parties.

§ 399. **Efflux of time.**—If it is expressly agreed at the commencement of the agency that it is to endure for a specified time, it will terminate at the end of that time; and an authority to do some specified act is exhausted and the agency terminated when such act or acts are performed, whether with or without the agent's intervention.

§ 400. **Revocation by principal.**—In general, the principal has power to terminate or revoke the authority given to his agent at pleasure. And this rule applies to every authority not coupled with an interest, even though it be expressly and in terms declared irrevocable.

§ 401. **Same—Power coupled with an interest.**—But where the power is coupled with an interest, it is irrevocable, and the principal can not, to the extent of the interest of the agent, revoke or destroy it at will. The interest that will, when coupled with an authority or power in the agent, render such power irrevocable, is hard to describe. It must, in general, be an estate or interest in the property or thing which is the subject of the power. Thus, a power of sale contained in a chattel mortgage, or

in a note secured by the pledge of collaterals, is a power coupled with an interest. But a mere interest in the results or proceeds of the agency, by way of compensation, is not enough. So, where one is empowered to sell certain property, or collect certain money for another and to have a commission out of the proceeds, the authority is nevertheless revocable at the will of the principal.

§ 402. **Power and right to revoke distinguished.**—A distinction has been made between the power to revoke the agent's authority and the right to revoke it. The power to revoke always exists before the authority is executed, unless the authority be coupled with an interest. As between the agent and the principal, the relation is one of contract, and if, by the terms of this contract, the employment is to continue for a definite time, the principal has no *right*, arbitrarily, and without default by the agent, to discharge him. If he does so he will be liable to the agent in damages, as already explained.[1]

§ 403. **When right to revoke exists.**—As a general rule, if no time be specified during which the employment is to continue, it may be terminated at any time by either party without liability to the other; and the fact that the salary is so much per month, or other fixed interval, is not conclusive that the employment is for such interval, unless from the surrounding circumstances such appears to have been the intention of the parties.

It is implied in the contract of agency that the agent will exercise a reasonable degree of skill, knowledge and ability. If the agent does not possess that reasonable degree of skill, knowledge or ability, or, possessing it, neglects to exercise it, the principal may discharge him without liability for breach of contract, though the hiring was for a fixed period not yet expired.

It is also implied that the agent will act honestly,

[1] *Ante*, § 387.

and that he will not willfully disobey reasonable and lawful instructions, nor willfully permit his principal's interests to suffer. A breach of this condition will justify discharge.

It is not for every slight offense or trifling fault, however, that the agent may be discharged. His conduct must be such as, from its dishonest, reckless or insubordinate character, is incompatible with faithful and efficient service.

§ 404. **How authority may be revoked.**—An authority may be revoked by writing, sealed or unsealed, orally, or by implication. Even a sealed authority may be revoked by parol. Neither must the revocation be in any particular form. It may even be implied, as where the principal himself disposes of the subject-matter or appoints another to discharge the duties of the agency.

§ 405. **Notice of revocation.**—The principal must notify the agent that his authority is revoked, and the revocation becomes operative, as to the latter, from the time it is actually made known to him.

In order to render the revocation of the agent's authority effectual as to third parties who, from their knowledge of the agency or from previous dealings with the agent, would be apt to continue to deal with him in the belief that the agency still continued, notice of revocation is necessary. If such parties honestly and without notice of the revocation continue to deal with the agent within the scope of his previous authority, the principal will be bound. The case is analogous to that of a partnership dissolved by act of the parties, and the rules as to the sufficiency of the notice are practically the same. Actual notice must be given to all who had previous dealings with the agent, or they must have knowledge of such facts as would put a prudent person on inquiry. As to others, notice may be given by publication in some newspaper of general circulation.[1]

[1] *Post*, § 465, *et seq.*

If the power concerns land, and is recorded, the revocation should likewise be recorded.

§ 406. **Renunciation by agent—Abandonment.**—The agent may, as a general rule, renounce his authority at any time, though he may be liable in damages for breach of his contract, if the employment is for a definite time unexpired, and he may forfeit his right to compensation for past services.

By Operation of Law.

There may occur such a change in the condition, capacities, or surroundings of the parties that the continuance of the agency is impossible or inconsistent, and it will thereupon terminate by operation of law.

§ 407. **Death of principal or agent.**—As a general rule, the death of the principal dissolves the agency instantly and for all purposes, unless the agent's authority be coupled with an interest. But if the power be coupled with an interest or estate in the property or thing to which the agency relates, and be capable of execution in the name of the agent, it is not revoked by the death of the principal.

Unless the authority be coupled with an interest, all attempts to execute it after the death of the principal are ineffectual to bind his estate, though the agent acts in ignorance of his death. Thus, payment to an agent, though made in good faith and in ignorance of the principal's death, does not bind his estate, and the administrator may still recover it from the debtor, unless the money actually came to his hands.

Unless the power be coupled with an interest it is absolutely terminated by the death of the agent. His executors have no authority to bind the principal, as they were not selected to represent him, and it can not be assumed that he has any personal confidence in them.

§ 408. **Insanity of principal or agent.**—Unless the authority of the agent be coupled with an interest, so that he can execute it in his own name, the after-occurring insanity of the principal dissolves, or at least suspends, the agency. The insanity of an agent terminates or suspends his authority, unless his power be coupled with an interest, for the principal can not be presumed to employ one who has not sufficient reason to understand the duties of his trust.

§ 409. **Bankruptcy.**—The legal bankruptcy of the principal, or his assignment for the benefit of creditors, divests him of the title to all property affected by such bankruptcy or assignment, and vests it in his trustees or assignees. As he can no longer deal with it in person, he can not do so through an agent, for the latter can not do that which the principal himself is powerless to perform. So far as the authority concerns property not affected by the bankruptcy it may survive.

The bankruptcy of the agent terminates his authority, except so far as it relates to the doing of some merely formal act, such as the execution of a deed in the principal's name.

§ 410. **Marriage of principal.**—As the effect of marriage, at common law, was to render the female incompetent to contract, her antenuptial appointment of an agent was revoked by her marriage. Now, under the statutes securing to her a separate estate and power to bind it, marriage would, it is thought, leave the authority of her agents as to that unrevoked.

§ 411. **War.**—The breaking out of war between the states or countries of the principal and agent, respectively, operates, in general, to terminate the agency by rendering its prosecution unlawful.

CHAPTER XXVI.

PARTNERSHIP.

- I. In general.....
  - a. Definition.
  - b. Business and legal views distinguished.
- II. Formation.....
  - a. What acts constitute partnership.
  - b. Partnership by estoppel or holding out.
  - c. Persons composing firm.
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- III. Incidents.....
  - a. Firm capital and property.
  - b. Rights and duties of partners as to each other.
  - c. Agency of partners for the firm.
- IV. Dissolution and winding up.
  - a. Dissolution.
    - 1. By act of partners.
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    - 3. By operation of law.
  - b. Notice of dissolution.
  - c. Effect of dissolution.
    - 1. On powers of partner.
    - 2. Distribution and priority.
- V. Limited partnership.

Nature and Formation.

§ 412. In general.—Many can often accomplish together what it is impossible for one to do alone. One person may have capital without the skill or knowledge to make it productive. Another may have just this skill or knowledge, but little or no capital. Then again, an enterprise may require so much capital that one could hardly contribute it alone, or it may call for so many different kinds of skill and knowledge that no one person could be supposed to possess them all. These are the principal circumstances that lead men to engage in such joint

enterprises as require a combination of the capital, knowledge, skill and effort of two or more. The different kinds of business associations through which such combinations are effected are known as partnerships, limited partnerships, joint stock companies, and corporations. Here, however, we have to deal with the law of ordinary partnerships, or partnerships as they exist at common law.

§ 413. **Definition.**—A partnership, or copartnership, is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals, for the purpose of joint profit. The contracting parties, called partners, or copartners, are collectively called a firm. Partnership is purely a contract relation, and requires no authority from the state for its formation, in which respect, among others, it differs from a corporation.

§ 414. **Business and legal views of firm distinguished.**—The mercantile and legal views of a partnership are in many respects quite different. The business man views a firm much as a lawyer views a corporation—as an entity or personified being distinct from its members. Thus the accountant makes the firm a debtor to each partner for what he brings into the common stock, and makes each partner a debtor of the firm for whatever he withdraws. The law, on the other hand, does not recognize the firm as a being distinct from the members who compose it. As a consequence of this all the partners must, independent of statute, sue and be sued jointly. The obligations growing out of the prosecution of the partnership business are the joint debts of the partners, and not of the firm as an entity, and what is called the property of the firm is really the joint property of all the partners.[1]

[1]Further on this subject, see *post*, § 485, where corporations and partnerships are compared.

§ 415. **What acts constitute a partnership.**— Whether a partnership exists depends, according to the weight of modern authority, upon the intention of the alleged partners as legally ascertained from their language or conduct. The tests, it is believed, are practically the same whether the question is raised between the parties themselves or by a third person. To this there is the single exception, that where one has held, or knowingly permitted himself to be held, out as a partner with another or others, he will be liable as such to a third party thereby misled to his injury.[2] In all other cases the parties must, by contract and with legal intention, have formed a relation possessing the legal elements of a partnership. If parties have formed such a relation they are partners, notwithstanding they may not deem themselves such, or have expressly declared that they were not to be partners.

But what acts constitute a partnership, either as between the parties or as to the third parties, is not the subject of any precise rule or test, and the cases themselves are inharmonious and confusing.

Formerly if one shared the profits of a business he was held liable to third parties as a partner therein, on the ground that he took a part of the fund to which creditors might look for the payment of their debts. But this is no longer the law. Thus, a mere agent, clerk or manager may take a part of the profits of a business as his compensation, and not be liable as a partner, even to third persons.

When, however, the parties have united their property, labor or capital, in some lawful enterprise in which each is to be a principal or proprietor, and not a mere servant, manager, or clerk, under an agreement to share profits and losses as such principals and proprietors, a partnership exists as a matter of law both between the parties and as to third persons.

[2] *Post*, § 416.

§ 416. **Partnership by holding out.**—If one has held, or knowingly permitted himself to be held, out as a partner with another or others, he will be liable as their partner to such third parties as have been thereby induced to deal with the firm in the belief that he was a member of it. Such supposed partner is called a partner by holding out or by estoppel.

The liability of a partner by holding out is based entirely on the fact that the third party has been misled into the belief that he was a partner. Hence, one can not be held liable, on the ground of holding out, to one who knew that there was no partnership in fact, or did not know of the holding out at the time he trusted, or where such holding out took place after the credit was given.

No particular mode of holding out is necessary. Thus, one who is present when held out as a partner and does not deny the partnership, or one who suffers his name to be used on the signs, business cards, letters and bill-heads of the firm, is liable to a party misled.

§ 417. **Of the persons composing the firm—Kinds of partners.**—As the formation of a partnership involves a contract between the partners, and as the prosecution of its business necessitates contracting with third persons, all the partners should be legally competent to contract. Here, as elsewhere, the ordinary rules as to capacity apply, with some exceptions, in the case of infants when seeking to disaffirm.

An ostensible partner is a partner in fact who is held out to the public as such. A nominal partner is not a partner in fact, but by holding out or estoppel, as previously explained.

A silent or dormant partner is one who takes no active part in the transaction or control of the partnership business, and who is not known as a partner to those who deal with the firm. A secret partner is one who is not known as a partner, though he may be active in the management of the firm.

The Form and Contents of the Contract.

§ 418. **In general.** — Aside from statutes, contracts of partnership may be oral or written. But the statute of frauds may make a writing necessary where the partnership is for more than a year, or is formed to deal in lands. In practice, however, and as a matter of business convenience and expediency, contracts of partnership should always be written, and should be so drawn as to be a code of directions, to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves such differences as may arise.

§ 419. **What should be expressed — Construction.** —What the contract should contain depends upon what the parties intend and desire. If they wish to alter the legal rules fixing their respective rights and duties, or to escape from the presumptions and intendments of law, this can be done, in general, only by their express agreement. They may also fix their rights and duties where the law makes no provision.

§ 420. **Beginning and duration of the partnership.**—If the time when the partnership is to begin is not stated to be otherwise it will commence when the articles are executed. If no time is specified during which a partnership is to continue, it is a partnership at will, dissolvable at the will of any partner.[1]

§ 421. **The firm name.**—The firm name, or style, as it is sometimes called, should also be agreed upon, and partners should be forbidden to contract for the firm except in that name. This may be important in determining, as between the partners at least, whether a given transaction is to be regarded as a firm transaction or not, and for other reasons.

[1] *Post*, § 456.

§ 422. **Nature of business—Competing with firm.**—Upon the nature of the firm business depends to a great extent the power of each partner to bind his associates and of the majority to control the minority; hence the nature of the partnership business and the place where it is to be carried on should be clearly stated. If any partner is to be allowed to carry on a competing business the articles should so provide.

§ 423. **Books of account.**—It is well to provide for the keeping of books of account, in such form and by such method as seems best adapted to the business, and that these books shall be kept at the place of business of the firm, open to the inspection of all the partners.

§ 424. **Capital—Salaries—Division of profit and loss.**—The articles should specify the amount of the firm's capital, and the amount and value of each partner's contribution thereto, so that, upon a dissolution, each partner's share in the surplus may be ascertained, and so that where profits are to be divided in proportion to contributions, their ratio may be obvious. If anything is to belong exclusively to one partner, and the firm is to have the use of it only, that should be stated.[1]

In the absence of special agreement, one partner can not charge a salary for services rendered to the firm, even though he is a managing partner.

The partners may share profits and losses in any proportion. In the absence of agreement to the contrary, it is presumed that the profits and losses are to be shared equally. And it makes no difference that the contributions to capital are unequal or that one partner contributed all the capital and the other only skill and service. The proportion in which profits are to be shared and losses borne should, therefore, be expressed.

§ 425. **Restrictions upon ordinary powers.**—If the ordinary powers of any partner are to be restricted

[1] *Post*, § 433.

within limits less than those fixed by the scope of the partnership business, this must be done by express agreement. But such restrictions, it will be seen, are not binding upon third parties unless they have notice of them.[2]

§ 426. **Suretyship prohibited.**—It is commonly provided that no partner shall enter into any contract of guarantee or suretyship during the continuance of the partnership.

§ 427. **Arbitration.**—Agreements to arbitrate disputes between the partners are often inserted in the articles, and are there given substantially the same effect as other agreements to arbitrate.

§ 428. **Allowance for subsistence.**—Where it is necessary for the partners to draw out from time to time certain sums for their private expenses, it should be expressly provided how much each shall be entitled to draw and when he may draw it, and to provide that overdrafts shall bear interest.

§ 429. **Option to dissolve.**—It is sometimes provided, where the partnership is for a fixed term, that any partner may withdraw upon giving notice in writing a certain length of time in advance.

§ 430. **Good-will.**—The good-will of a concern, if it exists at all, is property. Courts will so regard it, and will, if possible, protect it as the property of all the partners. But its somewhat vague and uncertain nature makes some express provision for its valuation and disposition upon dissolution of the firm desirable. If the surviving or continuing partners are to become owners of it, it should be so provided, and the amount to be allowed the retiring partner for his share in it should be fixed.

[2] *Post.* § 452.

CHAPTER XXVII.

OF THE FIRM CAPITAL AND PROPERTY.

Rights and Duties Inter Se.

§ 431. **Capital defined—Need not be money.**—By the capital of a partnership is meant the aggregate of the sums contributed by the partners for the purpose of commencing or carrying on the partnership business. Capital must be distinguished from loans by the partners to the firm and by the firm to its partners. More or less than a partner's capital may be due him, depending upon whether he is a lender to or a borrower from the firm. The contributions need not be in money, but may be goods, real estate, patent-rights, or any other species of property.

§ 432. **Property of firm—Nature of partner's share.**—Whatever is brought into the common stock at the commencement of the partnership, and whatever has been added thereto or acquired by means thereof, belongs, presumptively, to the firm as joint property. One partner can not take any specific portion of the partnership property and say that it is his exclusively. His interest is merely a right to share in the assets of the firm after its debts have been paid.

§ 433. **Individual and firm property distinguished.**—But everything which the firm uses or which produces its profit is not necessarily firm property. Thus, each partner may work with his own tools, the partnership being in the profits only, or one may contribute the mere use of certain property, reserving the title to himself. Whether certain property belongs

to the firm or to an individual partner exclusively, is, in general, a question of intention. What is joint property may be converted into separate property by a bona fide sale to a partner, and what is separate property may be made joint by being invested in the firm business.

§ 434. **Partnership real estate.**—As a firm, unlike a corporation, is not a person in law, the proper course is to deed real property, not simply to the firm by name, but to the partners individually, describing them as partners, doing business under a certain name or style. The legal title is then in the individual partners, and the equitable title is in the firm. And even where the deed is to one partner only, if the land is really partnership property, the single partner will hold it in trust for the firm.

§ 435. **Same—When deemed personalty.**—In this country partnership real estate is treated as real property, except so far as it would interfere with the payment of debts and the settlement of partnership affairs. For the latter purposes, however, it is usually regarded as personal property, and the rights of the widow, the heirs and individual creditors of a deceased partner, in whom the legal title is vested, are postponed until firm creditors are paid and the accounts of the partners adjusted.

§ 436. **Good-will.**—Good-will is "the benefit or advantage which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill, or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."

Upon dissolution, good-will is treated as an asset,

and whoever takes the benefit of it must account for its value, or it may be ordered sold if it is salable.

A sale by a partner of his share in the good-will and assets of the firm will not prevent him from competing fairly with the purchasers, unless he has restrained himself within lawful limits from so doing. But he can not carry on a new business in such a way as to make it appear that it is the old one.

§ 437. **The firm name.**—Intimately connected with the good-will is the right to use the firm name. The name may be that of one partner alone, or of one or more of the partners with the addition of the words, "& Co.," to represent the other or others, or it may be purely fictitious or fanciful, as, "The Madison Manufacturing Co."[1] How far the courts will protect a partnership name or restrict others in the use of it may not be certain. It is settled, however, that one who has not limited his right to do so by contract may use his own name in business, notwithstanding it constitutes the name of another firm, provided he acts in good faith and without design to mislead the public.

Of the Rights and Duties of Partners as Between Themselves.

§ 438. **Good faith required.**—The partnership relations is one of special trust and confidence, and each partner is held, in favor of his associates, to the greatest fairness and the most scrupulous good faith. Thus, if a partner employed to buy for the firm secretly supplies and takes pay for his own goods, he must account to his partners for the profits, even though he furnished the goods at the usual market price, for the benefit of his skill as a buyer belongs

[1] In New York the designation "& Co." must represent an actual partner, and there are occasionally some other statutory restrictions.

to the firm. Each partner must make full disclosure to his copartners, have no secrets from them, and be ready at all times to account to them for his management of the firm affairs. No partner may lawfully, either openly or in secret, carry on business in competition with the firm without the consent of his associates.

§ 439. **Power of a majority.**—In all cases of difference between the partners, the partnership articles should be consulted, and their provisions with respect thereto must control. If the articles are silent, however, the will of the majority will control with regard to matters arising in the ordinary course of the firm's business, and to their wishes the minority must yield. If the partners are equally divided, it is thought that those who forbid a change should have their way.

The majority are entitled to control only when acting in good faith and for the benefit of the firm, and after the minority have had a chance to be heard.

CHAPTER XXVIII.

OF THE POWER OF EACH PARTNER TO BIND THE FIRM.

§ 440. **Agency of partners—Scope of business.**—Every member of an ordinary partnership is a general agent of the firm for the transaction of its business in the ordinary way. Usually, then, the nature and scope of the partnership business determine the power of a partner to bind the firm to third parties. The *scope* of the business depends upon the general nature of the enterprise, and all acts are within that scope when reasonably necessary and appropriate to its prosecution in the ordinary way.

If a partner, though assuming to act on behalf of the firm, goes beyond the actual or apparent scope of its business, his associates are not bound, unless they specially authorized his act or have subsequently ratified it. A firm may, by a course of dealing known and acquiesced in by all the partners, extend the scope of its business, this being equivalent to an enlargement of the articles by common consent.

§ 441. **Trading and non-trading firms.**—A distinction is generally made between trading and non-trading partnerships, particularly with respect to the power of one partner to bind the firm by borrowing money and issuing commercial paper. All firms engaged in buying and selling as a business, whether at wholesale or retail, are trading partnerships. But attorneys, physicians, farmers, and usually those engaged in a single enterprise, are non-traders. But even in the case of non-traders, one partner may be specially authorized to borrow money or sign notes.

Authority to do Particular Acts.

§ 442. **Admissions.**—The declarations and admissions of one partner as to matters within the scope of its business are evidence against the firm, though not necessarily conclusive.

§ 443. **Arbitration—Assignment for creditors.**—One partner can not, without special authority, bind the firm by a submission of partnership matters to arbitration nor make a general assignment of the firm's property for the benefit of creditors, for such acts are unusual and can not be said to be necessary to the carrying on of its business in the ordinary way.

§ 444. **Bills and notes—Suretyship.**—A partner in a trading firm has prima facie authority to bind it by making, drawing, indorsing or accepting commercial paper in the firm name for partnership purposes. But if he gives such paper for his private debt, or in a transaction outside the scope of the partnership business, without the authority of his copartners, the firm is not bound to any holder with notice. To a bona fide holder for value, however, the firm is absolutely bound, even though the partner signing the firm name did so in fraud of his associates.

A partner in a non-trading firm has no implied authority to bind the firm by signing commercial paper, and it lies upon the holder to show a special authority.

Even a partner in a trading firm can not, without special authority, bind the firm by signing its name to a contract of guaranty or suretyship, or to accommodation paper. But a bona fide holder of firm paper without notice that it was given for accommodation is protected, though the partner signing had no special authority.

§ 445. **Borrowing power.**—One of the most dangerous powers of a partner is that of borrowing. In

trading firms this power always exists by implication unless the lender has notice that the loan, though ostensibly to the firm, is for the private benefit of the partner procuring it, or for purposes outside the scope of the business. In non-trading firms, one partner has no power to borrow on the credit of the firm, unless specially authorized.

§ 446. **Buying.**—Each member of a trading firm has implied power to purchase for the firm, and on its credit, whatever is necessary to carry on its business in the ordinary way. But if one partner seeks to bind his copartners by a purchase outside the scope of the partnership business, special authority or subsequent ratification must be shown.

§ 447. **Debts.**—Each partner has implied power to collect debts due the firm. So he may, in good faith, compromise a debt due the firm. Each partner has implied power to pay firm debts.

§ 448. **Notice to one partner.**—Notice to a partner is notice to his copartners, provided it relates to matters within the scope of the firm business. The rules applicable to ordinary agencies apply here.

§ 449. **Power to sell personalty.**—It is undoubtedly within the implied power of a partner in a mercantile firm to sell, in the usual course of business, any part of the personal property which the firm holds for sale. The partner who sells may also warrant.

But it is generally held that one partner has no implied power to sell firm property not actually or apparently held for sale, and upon the continued use and possession of which the transaction of the firm business depends. The power to sell, however, must always be exercised without fraud or collusion to which the purchaser is a party.

§ 450. **Sealed instruments.**—One partner has no implied power to bind his copartners by an instrument under seal. Contrary to the general rule of agency, it is generally held that a sealed instrument

executed by one partner will bind the firm, provided it was specially authorized or subsequently ratified, even though the authority or ratification was by parol merely.

§ 451. **Ratification.**—The unauthorized acts of a partner may become binding on the firm, if his copartners, with full knowledge of the facts, ratify and adopt them. The general principles of ratification laid down in the law of agency apply.

§ 452. **Where partner's power restricted.**—The partnership articles may lawfully provide that a partner shall have no authority to perform certain acts or make certain contracts, though they would otherwise be authorized because within the scope of the business. Third parties dealing with a partner with notice of these restrictions upon his powers are bound thereby, and can not hold the firm for contracts made or acts done contrary to these known restrictions, unless they are subsequently ratified by all the partners. Third parties dealing with the firm are not affected by such restrictions in the articles unless they are aware of them.

§ 453. **Torts of the partners—Fraud.**—As each partner is the agent of the firm, the firm is liable for the torts of any partner committed by him while acting within the scope of its business, upon the general principles of the law of agency. But for the torts of one partner not committed within the scope of the business or specially authorized the firm is not liable. The firm is liable for the frauds of a partner committed while acting within the scope of his apparent authority, though the other partners were entirely innocent.

§ 454. **Extent of partner's liability upon contract.**—Every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. This does not mean that the partners may be sued separately. When judgment has been recovered against the partners

jointly, however, the creditor need not to levy upon the property of the firm, but may levy upon the separate property of the partners. Neither need the creditor levy ratably upon the property of all the partners, but may select any one or more of them, and levy execution against him or them until the judgment is satisfied, leaving all questions of contribution to be settled between the partners themselves.

Even though a partner retires under an agreement that the continuing partners shall, with the incoming partner, if any there be, assume and pay the partnership debts, such agreement does not bind firm creditors or affect their rights against the retiring partner unless such creditors become parties to the agreement.

CHAPTER XXIX.

DISSOLUTION AND ITS CONSEQUENCES.

§ 455. **Dissolution by mutual consent.**—A partnership, whether at will or for a fixed term, may be dissolved at any time by agreement of all the partners. Such an agreement may be express, or it may be implied, as where all the partners join in winding up its affairs and distributing its assets.

§ 456. **By act of one partner—Partnerships at will.**—A partnership, unless formed for a specified time, or for the completion of a specified undertaking, is called a partnership at will, and may be dissolved at any time by any partner, who may withdraw at pleasure, even against the will of his associates. If a partnership for a definite time, which has expired, is continued without further agreement, it is a partnership at will, and all the terms of the original agreement, except as to time, remain in force.

The partner who withdraws from a partnership at will must notify his copartners of his intention to dissolve. The dissolution dates from the notice, and not from the time when the partner determined to withdraw.

§ 457. **Same—Partnership for a fixed time.**—One member of a partnership for a fixed term probably has the power to withdraw before the expiration of such term, and thus dissolve the firm. But he has not the *right* to withdraw without the consent of his copartners, and if he does so he will be liable to his associates in an action for damages. But a court of equity will seldom, if ever, decree a specific performance of an executory contract of partnership, or

interfere by injunction to hold reluctant partners together.

§ 458. **Dissolution by decree of court.**—Courts of equity have power, in a proper case, to render a decree dissolving a partnership before the time fixed for its continuance has expired. But they will only do so for adequate cause. In such suits a receiver is usually appointed to collect, preserve and distribute the partnership assets. The following are common grounds for decreeing a dissolution:

(a) *Misconduct.*—The willful misconduct of a partner, so gross as to endanger the prosperity of the firm and destroy mutual confidence, persistent violation of the partnership articles, fraud upon the firm, habitual drunkenness, and competing with the firm, have all been held to warrant a decree in favor of the injured partner.

(b) *Hopelessness of success.*—As the object of a partnership is profit, if profits are clearly impossible because of the hopeless condition of the partnership business, the continuance of which would involve the partners in almost certain loss, a dissolution will be decreed.

(c) *Chronic quarreling and hostility.*—While equity will not decree a dissolution for petty quarreling and occasional outbursts of temper, it will do so if the quarrels, differences and dissensions are of so serious a nature as to make reconciliation impossible and prosecution of business impracticable.

(d) *Fraud.*—Where one is induced to enter into a partnership through the fraud of his copartner, he is entitled to a decree dissolving the firm, and to a return of his capital and advances, provided he acts promptly upon discovering the fraud.

(e) *Insanity.*—The insanity of a partner does not, by the weight of authority, operate *ipso facto* as a dissolution. It is a cause for dissolution, however, if it is shown to be permanent, in which case a court of equity will decree a dissolution.

Events Which Dissolve the Firm Without Decree.

§ 459. **Death.**—The death of a partner dissolves an ordinary partnership instantly and for all purposes, and no notice of dissolution is necessary as to third persons.

§ 460. **Marriage.**—At common law the marriage of a female partner dissolves the firm. This rule is now changed by statutes in many states, and marriage has no effect upon the contract capacity or property rights of the female. But the marriage of copartners probably dissolves the firm, even under the most liberal of these statutes.

§ 461. **War.**—A declaration of war effects an immediate dissolution of a partnership existing between residents of the antagonistic states. The duty of partners to account to each other and pay over profits earned before the war is not discharged, but revives and may be enforced upon a return of peace.

§ 462. **Sale of all the firm property or of a partner's interest.**—Where the entire share of a partner is sold to a stranger, either voluntarily or on execution, this dissolves the partnership, whether it is at will or for a fixed time.

The sale or total destruction of all the property of the firm, the dealing in, or management, or operation of which constituted its sole business, dissolves the firm.

§ 463. **Bankruptcy.**—A judgment of bankruptcy against the firm, or any of its members, dissolves it. The same is true where the firm, or any partner, makes a voluntary assignment for the benefit of creditors.

§ 464. **Purchase of partner's interest by copartner.**—One partner may purchase the interest of his copartner. If he buys the entire interest, and the selling partner retires, this operates as a dissolution. But if the selling partner continues to act as a part-

ner, contributing his labor and skill and sharing in the profits, the firm is not dissolved.

§ 465. **Notice of dissolution.**—Though a firm may be dissolved as between the persons composing it, it may be deemed to continue as to third parties. To these the partners, having once become known as such, can not suddenly and secretly terminate their relations and escape liability for acts and contracts within the scope of an agency which apparently continues to exist. The partners must take proper steps to make the dissolution known, otherwise they may be bound to third parties who give credit to their late associates in the belief that the partnership still subsists.

§ 466. **When notice is necessary.**—No notice is necessary when dissolution takes place by judicial decree, or by operation of the law, as in case of war, death or bankruptcy. A dormant partner who retires need not give notice except to those who knew of his membership in the firm. In all other cases notice is necessary.

§ 467. **What sufficient notice—Former dealers.**—Former dealers, or those who have previously given credit to the firm, are entitled to actual notice of dissolution, which is generally given by mailing or delivering to them personally a written or printed notification.

Non-dealers include those who have dealt with the firm on cash basis and those who have never dealt with it. These should be notified of dissolution by advertisement in a newspaper of general circulation at the place where the business is carried on. Actual knowledge of dissolution, however acquired, is sufficient, whether the party to whom it is brought home be a former dealer or not.

§ 468. **Effect of dissolution upon powers of partners.**—After dissolution, the partners are no longer the agents of the firm to carry on its business in the ordinary way. They have still some powers, but

these relate solely to the winding up of the business and the distribution of the partnership assets.

§ 469. **Who entitled to participate in winding up.**—In general, all the partners have a right to participate in the winding up of the firm business. If the dissolution was caused by the death of a partner, however, the survivors have sole power to wind up the partnership affairs. In this the executors or administrators have no voice or authority.

§ 470. **Debts and property.**—After dissolution, all the partners, or the survivors, have power to receive and receipt for all debts due the firm and to apply its funds to the payment of its debts.

Each partner has the power, after dissolution, to dispose of the firm assets for the purpose of paying partnership debts and converting it into money for distribution. Debts and accounts due the firm may be sold and assigned.

§ 471. **New debts and contracts.**—After dissolution one partner has, in general, no implied power to create any new contract or indebtedness whatsoever against the firm. He can not exercise the borrowing power, even for the purpose of paying firm debts. Neither can he bind the partnership by giving a note for an old debt, or even in renewal of a note previously given, nor is the late firm bound by his indorsement, though his indorsement may be sufficient to pass the title. To an indorsee, without notice of dissolution, the firm is liable.

§ 472. **To perform unfulfilled contracts.**—If, upon dissolution, there remain unperformed contracts previously entered into, the firm is still bound to perform them, and one partner may proceed to perform, and the other partners will be bound by his acts in so doing. But if the partners have bound themselves to the performance of what calls for the joint skill of all, the death of one not only dissolves the firm but discharges the contract.

Distribution and Priority.

§ 473. **Partner's lien—Priority between joint and separate creditors.**—The so-called lien of a partner is nothing more nor less than an equitable right in him to have the assets of the firm applied to the payment of partnership debts, so as to exonerate him from liability of such debts, and to compel the application of the surplus to the payment of any balance that may be due him upon a final adjustment of the partnership accounts. Ordinarily this lien comes into play only when the assets of the partnership are in court for administration, for while the business of the partnership is still being prosecuted the partners may, so long as they act in good faith, sell or mortgage the firm property, or turn it out in paying one or more firm creditors in full, though nothing is left to pay the others.

§ 474. **Same—Assets in hands of court.**—But when the firm assets are administered by a court of equity upon dissolution, or in bankruptcy, or in assignment proceedings, or in settlement of insolvent estates, the right of the partners to have firm assets applied to firm debts operates to give partnership creditors a right to payment out of firm property before the private creditors of any partner can have anything from it. So, if a private creditor levies on partnership property, his levy holds only the share of the debtor partner after firm debts are paid, and subsequent levies of partnership creditors must be satisfied first.

§ 475. **Same—Individual creditors and individual assets.**—Upon reasoning not altogether satisfactory, but with results apparently just, the individual creditors of a partner are given a reciprocal priority in his private estate. But when there is no partnership property and no living solvent partner, individual and firm creditors stand upon an equal footing.

§ 476. **Distribution as between partners.**—After

the debts and engagements of the firm have been fully discharged, it remains to be considered how the affairs of the former partnership are to be adjusted between the partners, or the survivors of them and the representatives of a deceased partner. This task may be simple or complicated, depending upon the circumstances of the case, and little more can be done than to refer to a few leading principles. It is obvious, of course, that a correct adjustment can not be reached without paying strict attention to the contract, oral or written, between the partners.

In distributing partnership assets, debts due third parties having first been paid, the following order of priority obtains:

(1) Each partner should be repaid any advances he may have made to the firm, as distinguished from his share of the capital.

(2) Each partner should be repaid his capital, if the assets are sufficient. If the assets are not sufficient to repay capital, then each partner is entitled to his capital less his share of the deficiency, which is a loss.

(3) If, after repaying advances and capital, there is a surplus or residue, it is profit, and must be divided among the partners in the proportion agreed upon.

If there is not enough to pay non-partners in the first instance, the partners must make up a sufficient sum by contributions among themselves. If there is enough to pay non-partners but not enough to repay advances by the partners themselves, the deficiency will be distributed in such way as to equalize the loss. If, after the repayment of advances in full, there is not enough to repay each partner his full capital, the deficiency must be distributed among the partners as a loss.

CHAPTER XXX.

LIMITED PARTNERSHIPS.

§ 477. **Definition and purpose.**—Limited partnerships are business associations having many of the attributes of an ordinary partnership, authorized by statutes, and not otherwise, wherein the liability of certain members, called special partners, is limited to the amount of capital contributed by them; other members, called general partners, remaining liable to the creditors for all the debts of the firm, as in ordinary partnerships. The object of these partnerships is to enable capitalists and others to employ their wealth in trade without risk beyond their investments, and at the same time to secure the services of men of skill and integrity in managing it and rendering it productive. Statutes authorizing limited partnerships are found in nearly all our states and territories.

Strict, or at least substantial, compliance with the local statutes, both in forming the partnership and in conducting its business, is usually essential to secure the limited liability of the special partners.

Other Associations.

§ 478. **Joint stock companies.**—A joint stock company, so-called, is in most states nothing more than a large partnership with transferable shares. The members of such associations are liable for the debts of the company the same as ordinary partners. The business of these concerns, like that of a corporation, is usually in the hands of a board of directors or

trustees. Suits by and against the association are often authorized to be brought in the name of some specified officer. These companies are quite generally superseded by corporations proper, which will be next discussed.

Members of unincorporated societies and clubs are frequently held liable upon the ground of agency.

CHAPTER XXXI.

CORPORATIONS.

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Nature and Formation.

§ 479. **Importance.**—Within the past seventy or eighty years, the utility of incorporated companies in the prosecution of business enterprises has made them an almost universal means of uniting large masses of capital in private undertakings. The railroad, banking, insurance, lighting, telegraph and telephone business of this country are now almost wholly in the hands of corporations, which are also found a highly efficient and popular form of association for the prosecution of nearly every kind of manufacturing and mercantile business.

§ 480. **Definition and nature.**—The most common conception of a corporation is a collection or association of natural persons joined together by the authority of the state or government, and endowed with the power of acting in many respects as a single individual. In fact, from a strictly legal point of view, a corporation is an artificial being or personality possessing, in legal contemplation, and for most purposes of legal thought and procedure, an existence separate and distinct from that of the members composing it. Through the fiction of this corporate being or entity, the rights and duties of the real persons interested are adjusted and worked out, the corporation furnishing a convenient repository for the common property, and a convenient agency for the enforcement of the common rights and duties, as it remains unaffected in law and is not dissolved by the death or withdrawal of members and the substitution of others in their stead.

§ 481. **The results of recognizing a corporation as an entity.**—The universal recognition by the courts of a corporate being or entity has led to the following important results.

1. A corporation, having a legal existence separate and apart from that of its members, is not dissolved by their death and withdrawal and the substitution of others for them.

2. It may take and hold property in the corporate name, the legal title to which is in it, and not in its members as individuals, either separately or collectively.

3. It may sue and be sued like a natural person.

4. Debts incurred and contracts made in the corporate name are the debts and contracts of the corporation itself, and bind only its assets and property. In the absence of statutes, therefore, or of special circumstances, the members are not individually liable upon such debts and contracts.

5. It may contract with its own members and sue and be sued by them.

§ 482. **Corporate powers and attributes in general.**—Ordinarily every corporation has capacity: (1) To have succession under a special name and under an artificial form; (2) to take and grant property, contract obligations, and sue and be sued by its corporate name as an individual; (3) to receive and enjoy in common grants of privileges and immunities; (4) to have a common seal; (5) to make by-laws. All of these powers are touched upon later.

§ 483. **Kinds of corporations.**—The word corporation is used to describe institutions differing widely in their constitutions and purposes.

The most common classification of corporations at the present day is into public and private. Technically, public corporations are governmental institutions created by law for the administration of the public affairs of particular communities. To this class belong, in a sense, the state, and cities, towns, counties and school districts. To the formation of a public corporation the assent of the parties incorporated is not necessary, though often obtained.

Private corporations, however, are such as are created to accomplish some private end. To this class belong religious and most charitable corporations, as well as railroad, banking, insurance, manufacturing and trading corporations. Railroad, telegraph and canal companies are sometimes said to be *quasi*-public in their nature, but they are technically private corporations, in spite of the fact that they owe important duties to the public. The consent of the incorporators is always essential to the creation of a private corporation.

§ 484. **Stock corporations.**—Corporations formed for the pecuniary profit of their members, with a capital stock divided into shares, now constitute the most numerous and, in a business point of view, the most important class of corporations. Like partnerships, they are formed for private gain, and possess a capital which can be increased by profits and diminished by losses. The shares of members, however, unlike

those of partners, may be transferred with the utmost ease and freedom without dissolving the corporation or interrupting its business. The law of business corporations, therefore, is largely the law of stock and stockholders.

§ 485. **Compared with partnerships.**—In ordinary business, both partnerships and corporations are treated as collective bodies. In law, however, partnership is a purely contractual relation, and partners, as to each other, stand in a position of special trust and confidence, and the acts of one partner are, in law, the acts of all. The death of one partner dissolves the firm, as does the assignment of his interest in the concern, or its seizure by private creditors. Neither, unless authorized by statute, can suit be brought by or against it in the partnership name, but all the partners must he joined either as plaintiffs or defendants.

With a corporation it is otherwise. A contract between the original incorporators is necessary (if the corporation be private), yet an act of the legislature is essential to give it legal existence. Corporate acts are binding, in general, upon the corporation alone, and upon such assets as stand in the corporate name, and in this name it must sue and be sued. In the absence of a statute expressly imposing it no liability for corporate debts can fall upon individual members or their private estates. Change in the members of a corporation does not dissolve it, and, though its entire membership be renewed any number of times, its legal existence is not disturbed, nor is the legal title to its property changed.

§ 486. **How corporations are formed.**—Nothing less than the sovereign power can create a corporation, and in this country they are created by the legislature, and not otherwise.

Our legislatures authorize and create corporations in two ways:(1) By special act or charter; (2) by general law.

§ 487. **By special act or charter.**—When the legislature passes a statute for the special purpose of authorizing a particular corporation, such corporation is said to be created by special charter. But constitutional provisions in many of the states prohibit the formation of private corporations except under general laws.

§ 488. **Incorporation under general laws.**—General incorporation laws in nearly all the states extend the right to form a corporation, and to exercise corporate powers, to all who comply with certain prescribed conditions; and an association so formed is incorporated as fully as if it had been granted a special charter. In forming corporations under general laws, strict reference should be had to the local statutes, and the advice of a competent practitioner should always be sought.

The organization of a corporation is set on foot by persons called promoters, who are simply persons who exert themselves in the formation of a corporation. They interest such parties as they desire, a meeting is called and a plan of action is agreed upon. If a stock corporation is contemplated a part of the stock must usually be subscribed for and an organization effected by the election of directors or trustees. Articles of association are then prepared, which must be signed and acknowledged by a certain number of corporators. In some states the association becomes a corporation immediately upon filing the certificate or articles of organization with the county clerk or other specified officer and a duplicate with the secretary of state, while in others public notice must be given that a charter will be applied for, after which the certificate is presented to and passed upon by some court or officer.

The articles of organization, together with the general law under which the corporation is formed, are now, in effect, the charter of the corporation. Failure to comply with the law in an essential particular may render the shareholders liable as partners.

CHAPTER XXXII.

OF CAPITAL AND CAPITAL STOCK.

Ownership and Transfer of Shares.

§ 489. **Capital and capital stock distinguished.**—"Capital" and "capital stock" are often used interchangeably as meaning the whole property of corporation. But the term capital is more properly used to describe the entire assets of the company, which, it is obvious, may increase or diminish with its varying fortunes. Capital stock, however, is the amount fixed by the charter or articles of association and contributed, or authorized or agreed to be contributed, by the stockholders to the common fund, to be used and managed for the benefit of the stockholders and creditors. The actual capital may vary, but the capital stock remains the same until it is increased or diminished by authority of the legislature.

§ 490. **Shares of stock defined.**—The capital stock is divided into aliquot parts called shares; and a share of stock has been defined as the interest which the owner has in the management, profits and ultimate assets of the corporation. Shares of stock are deemed personal property, even where the property of the corporation itself is principally real estate.

§ 491. **How membership is acquired.**—Membership in a stock corporation consists simply in the ownership of one or more shares of stock. One may acquire stock in either of two ways: (1) By means of a contract entered into directly with the corporation; (2) by succeeding to the rights of one who was previously a shareholder, as by a purchase, gift or bequest of the shares.

§ 492. **Subscriptions.**—A contract between a corporation and a third party, by which the latter acquires membership in the company, is called a subscription, and the party so acquiring membership is called a subscriber. Subscriptions need not be in any particular form, independent of statute or charter provisions, and it may be stated, generally, that whoever signs an unconditional agreement to take a given number of shares in a corporation already formed, becomes a stockholder immediately, subject to the conditions named in the subscription paper and those imposed by the charter or the general law under which the corporation was formed. In practice, stock subscriptions are usually in writing, either upon books of the corporation, opened to receive them, upon the articles of organization, or otherwise. It is held in some states that an oral contract of subscription does not bind. Yet many courts hold otherwise, and, in any case, the subscriber becomes a stockholder by the acceptance of stock certificates and participation in the privileges of a stockholder. Statutes and charters may also point out particular modes of subscription, and these are given greater or less effect, depending upon the language of the law or charter or the views of particular courts. Difficulty has also arisen with the agreement to become a stockholder in a corporation afterward to be formed. Most courts hold that such subscriptions are in the nature of offers which may be accepted by the corporate authorities when the organization is complete, when they become binding upon both parties forthwith.

§ 493. **Calls.**—A subscription for shares implies a contract to pay for them whenever payment is properly demanded by the corporation, whether there is express promise to pay or not. But before the corporation can sue its stockholders to enforce payment of the whole or any part of their subscriptions, a 'call' must usually be made, unless, by the terms

of the subscription, the time of payment is expressly fixed. A call is a declaration by the directors of the corporation that the whole or some specified part of the subscriptions for stock is required to be paid into the corporate treasury.

After a call has been lawfully made, the proportion of the subscription included therein becomes a legal debt due from the stockholder to the corporation. By statute or decisions in some states, and, in many cases, by the terms of the charter or articles, notice of calls must be given before an action against the stockholders will lie.

§ 494. **Payment for shares.**—As a general rule, every subscriber for stock is bound to pay for his shares, in money or money's worth, at their full par value, and any agreement between an individual stockholder and the managing officers of the corporation, by which such payment is sought to be dispensed with or evaded, is contrary to law, and may be impeached by corporate creditors and non-assenting stockholders So far, at least, as creditors are concerned, this results from the just and well established doctrine that the capital stock of a moneyed corporation, whether actually paid in or only contracted to be paid in, is a trust fund for the payment of its debts.[1]

Unless the statute or charter requires payment in cash, shares may be paid for in whatever species of property the company might purchase without violating its charter. Thus, payment for stock in a railroad may be made in railroad iron. Of course, where the subscription is not expressly payable in labor or property, the company may demand cash.

§ 495. **Certificates of stock—Form and nature.**—A stockholder who has fully paid in the amount of his shares, in compliance with his contract of subscription, is entitled to what is called a stock certificate, or certificate of shares, and may sue to compel

[1] *Post*, § 525.

its issue by the corporate officers, if it is improperly withheld. Certificates of stock are commonly in the following form:

PHŒNIX LAND AND LUMBER COMPANY.

Number.	Shares.
210.	50.

This certifies that W. R. Jones is the owner of fifty shares of the capital stock of

THE PHŒNIX LAND AND LUMBER COMPANY,

A corporation duly organized under the laws of the state of Wisconsin. Said stock is fully paid and non-assessable, and is transferable only on the books of the company in person or by attorney, on return of this certificate properly signed.

IN WITNESS WHEREOF, Said company has caused these presents to be subscribed by its President and Secretary, and its corporate seal to be affixed at Milwaukee, this 10th day of June, A. D. 1895.

B. A. WHITE, President.

[Seal.] NATHAN ALLEN, Secretary.

§ 496. **Sale and transfer of shares.**—Like other kinds of personal property, shares of stock are capable of being disposed of, without restriction, at the pleasure of the owner.

A mere agreement for the sale and purchase of shares in the future is governed by the same principles which apply to other executory contracts for the sale of personal property. Such an agreement does not constitute the purchaser a shareholder until it becomes executed, and, upon breach, the ordinary remedy of the buyer is by suit for damages.

Where a contract for the sale of shares is fully executed, the title to them vests in the purchaser, who becomes a shareholder immediately. The outgoing shareholder loses all right to participate in the management and profits of the company, and is no longer liable, independent of statute, to contribute further to the capital of the concern. The purchaser, on the other hand, becomes liable for calls and entitled to vote and take dividends.

§ 497. **How transfer effected—Form of assignment.**—There are three steps to be taken in a formal transfer of shares. The first step is the assignment

of the certificate of shares. In practice, this is effected by a formal instrument of transfer, usually on the back of the certificate, signed by the transferrer and followed by the delivery of the certificate to the transferee. The assignment is usually in the following form:

> For value received I hereby sell, assign, and transfer unto John Walker all the shares of stock within mentioned, and appoint Ellis Howe my true and lawful attorney to make the necessary transfer on the books of the company.
>
> Witness my hand and seal this 30th day of July, 1895.
>
> W. R. Jones. [Seal.]

The names of the transferee and of the attorney, who is usually the secretary of the corporation, may be filled in at the time of the transfer, or the spaces for these names may be left blank. If they are left blank the purchaser may transfer the certificate to a second purchaser by mere delivery, and these transfers may continue indefinitely. Any purchaser who desires to be registered as a shareholder is authorized to fill in the blanks with his own name, and with that of an attorney of his own selection, and to procure a registry on the books of the company.

§ 498. **Registry of the transfer.**—The second step is to procure registry on the books of the company. The incorporating statutes or charters, or the by-laws of most corporations, provide that shares shall be transferable only on the books of the company. The object of such provisions is to provide the company and persons dealing with it the means of ascertaining who are the stockholders. As between transferrer and transferee, the transfer is good without registry, from the moment the certificates are assigned. The corporate officers are bound and may be compelled to register as a shareholder the lawful assignee of the certificates.

§ 499. **Cancellation of old, issue of new certificates.**—The third step is the cancellation of the old certificate and the issue of a new one to the purchaser in its place, in the name of such purchaser.

The corporation has a right in every case to insist upon a surrender and cancellation of the old certificate before issuing a new one.

§ 500. **Effect of failure to register.**—As a general rule, a corporation is bound to recognize as its shareholders only those who are registered as such upon its books. An unregistered shareholder can not vote at corporate meetings. So, the corporation is protected in paying dividends in good faith to one registered as a shareholder, though the certificates were assigned before the dividend was declared. So, if the transfer is unregistered, the assignor and not the assignee may be liable for calls. But it is usually the duty of the assignor of certificates to account to the assignee for dividends declared and received subsequently to the assignment, without regard to registry. The holder of certificates may be liable to refund calls which the assignor has been forced to pay,

As to the rights of creditors of a registered shareholder who seek to reach his shares by attachment or execution, after he has assigned his certificates, but before they have been registered in the name of the purchaser, the courts do not agree. If the levy is made before the creditor has notice of the transfer, many courts hold that it is good against a prior assignee of the certificates.

CHAPTER XXXIII.

MANAGEMENT OF CORPORATIONS—DISTRIBUTION OF PROFITS.

§ 501. **Management in general.**—As a corporation is, for most purposes, an artificial person or entity, it can not act except through its members, or through officers or agents directly or indirectly authorized to represent it. The distribution of the various powers and functions among the different bodies within the corporation and among its different officers and agents therefore requires some discussion.

§ 502. **Power of the majority.**—Every member of a corporation aggregate, by purchasing and holding its shares, impliedly agrees that he will be bound by all acts within the scope of the powers and authority conferred by the charter which shall be lawfully adopted and sanctioned by a vote of the majority of the corporation.

The power of the majority to bind the corporation, however, is derived from the charter, and they can not bind it by any transaction outside the scope of its chartered purposes.

Ordinarily, the acts that the majority may directly do toward managing the corporation and shaping its policy are few in number. This is due to the fact that the direct powers of management are usually vested in a select body of men, called directors, whom the majority elect in the hope and expectation that it will carry out their wishes.

The principal powers of the majority are three in number: (1) The elective power; (2) the legislative power; (3) the power to decide upon important changes in the company's business.

§ 503. **Same—Elective power.**—The power to elect the directors or managing board of a stock corporation is vested in the whole body of shareholders. Usually this is the limit of the elective power, the power to choose a president and other corporate officers or agents being vested, as a rule, in the board itself, or in officers or agents elected or appointed by the board. This is a matter depending largely upon statute or charter regulations.

§ 504. **Same—Legislative power—By-laws.**—The majority may make reasonable rules for the better government of the company. These are termed by-laws, and when lawfully enacted are binding upon all its members. Third parties dealing with a corporation with knowledge of a by-law governing the conduct of its business will usually be bound thereby on the assumption that it forms a part of the contract by reason of assent implied from silence, or that it constitutes a known limitation upon the powers of the officer or agent with whom they deal. But third persons having no notice or knowledge of corporate by-laws are not usually bound by them. In this respect a mere by-law differs from a provision of the charter or articles of association.[1]

§ 505. **Same—Changes in the company's business.**—A majority of the shareholders may sometimes exercise power in deciding upon important changes in the company's business. But the power to do so is usually conferred by statutes, which often require the action of more than a mere majority in the ordinary sense of the term.

§ 506. **Corporate meetings.**—The majority can bind the company by its vote only when acting at a regularly convened and lawfully conducted corporate meeting. If the meeting is properly called it is not necessary that all the stockholders be present. In the absence of a by-law, or of statutes, or charter provision to the contrary, those who actually assem-

[1] *Post*, § 518.

ble at a corporate meeting, regularly and properly convened, constitute a quorum for the transaction of business, and the majority of votes cast by them will determine the action of the corporation.

At present, by statute in most states, or by charter or by-law, or by well established usage, each shareholder has one vote for each share of stock that he owns. A majority, therefore, commonly means not a definite number of persons, but a definite number of shares, usually the majority of shares legally voted. Only registered shareholders are entitled to vote.

§ 507. **Voting by proxy.**—At common law the shareholder must vote in person. Now by statute, charter or by-law a shareholder may appoint a person called a proxy to vote his shares for him. Such an authority is usually conferred by a writing, also called a proxy, as to the genuineness of which the corporate officers may require reasonable evidence.

§ 508. **How the meeting is called.**—The question of who may call a meeting of stockholders has apparently been left by statutes and decisions at very loose ends. But the power undoubtedly resides in the directors, who, if they neglect to act, for the purpose of perpetuating themselves in office, may be compelled by the courts to call a meeting.

As each shareholder has a right to be present at a corporate meeting, not only for the purpose of casting his vote, but to enable him to exert his influence by argument upon his fellow-members, every shareholder must be properly notified of every meeting before it is held. If the charter or by-laws fix the time and place of regular meetings, this is notice enough, but if extraordinary business is to be transacted at a regular meeting, special notice must be given, specifying the nature of the business to be done. If the meeting is special, notice must be given to every member, specifying the time and place of holding it and the nature of the business to

be transacted. Matters not mentioned in the notice can not lawfully be acted upon.

But it is immaterial that no notice was given, or that the notice was defective, if all the shareholders were present and participate in the meeting without objection or subsequently acquiesce in what was done.

Officers and Agents—Their Powers, Duties and Liabilities.

§ 509. **The directors.**—The active management of the corporate business and affairs is vested, as we have seen, in a select body of men called directors or trustees, chosen by the majority in the manner prescribed by law.

In all business corporations, by statute or charter, directors must usually be shareholders. Unless otherwise provided, ownership of a single share is sufficient.

§ 510. **Must act as a board, quorum.**—As a general rule directors must act as a board and not separately, and have power to bind the corporation only when acting together at a meeting duly convened. Usually the majority of the directors constitute a quorum, and the majority of that quorum may bind the corporation by its resolutions; but this may be varied by either statute or charter. Acts done by less than a quorum may be ratified at a meeting regularly convened.

Every director has a right to be present at a meeting of the board, to vote and be heard, and it is the right of the shareholders that he should be. A meeting of the directors must be held, therefore, upon due notice, and the sufficiency of the notice is governed by principles similar to those applicable in the case of stockholders' meetings.

§ 511. **Powers of the directors.**—The directors are impliedly authorized to do all acts which are proper

to carry out the company's chartered purposes, but they can not lawfully depart from these purposes. Within the scope of the chartered purposes, however, the directors are invested with wide discretion, in the exercise of which they can not be controlled even by the majority of the stockholders. But the shareholders and not the directors have power to decide upon important changes in the company's business and to determine whether or not it shall be wound up.

Distribution of Profits.

§ 512. **Dividend defined—Discretionary with directors.**—A dividend is a corporate profit, set aside and ordered by the proper corporate authorities, to be paid to the stockholders. In most cases the directors have sole power to declare a dividend, and to determine, in the exercise of a fair and honest discretion, whether any or all of the profits of the company shall be divided among the shareholders, and to fix the time and place of payment.

§ 513. **Dividends must be equal.**—All the shareholders (unless there be preferred shares) are entitled to the same per centum of profit upon their shares. If an unfair distribution of profits is threatened, it may be enjoined.

Preferred or guaranteed stock, as distinguished from common stock, is stock the owners of which are entitled to receive a dividend up to a certain percentage upon their shares before the other shareholders are entitled to any share of the corporate profits. Such stock is usually issued when the company has reached such a crisis in its affairs that it must have more capital or suspend, and the original stockholders, though unwilling to invest further capital, are willing that any who will invest shall have a priority in the payment of dividends.

§ 514. **A debt due the shareholder.**—A cash divi-

dend duly declared is a debt due from the company to the shareholder. If no future time be fixed for its payment it is due immediately, and the stockholder may sue at once to recover it. If it is payable at a future day, it may be sued for when that day arrives.

§ 515. **Stock dividends.**—Whenever the directors are authorized to issue new shares, and profits exist which may be lawfully divided, they may issue to the then shareholders of the company an amount of stock equal at par to the profits on hand, retaining such profits in the business. This is called a stock dividend. It merely changes the form of each stockholder's investment by increasing the number of his shares and diminishing their value, the assets of the corporation remaining the same.

§ 516. **To whom dividends belong—Vendor and vendee.**—The law refuses to investigate the question of when dividends were earned, considering them earned the moment they are declared. As between the vendor and vendee of shares, the vendor is entitled to all dividends declared before, and the vendee to all dividends declared after, the transfer. But the parties may lawfully change this rule by their express agreement, which will be valid as between themselves.

CHAPTER XXXIV.

CORPORATE POWERS WITH RESPECT TO PROPERTY AND CONTRACTS.

Mode of Contracting.

§ 517. **Power to hold property.**—A corporation has implied power to acquire and hold any property, real or personal, which may be necessary or convenient to carry on its business and effect its authorized purposes, unless expressly forbidden by law. But it can not enter into a valid contract for the acquisition of property for purposes foreign to its charter.

§ 518. **Validity of corporate acts and contracts.**—The state charters corporations or permits them to be formed under general laws, only for certain prescribed purposes. When so formed they are invested with the qualities of individuality only so far as may be necessary to enable them to accomplish the ends for which they were created. If a corporation steps aside from its charter purposes, therefore, and attempts to do some act or make some contract not expressly or impliedly authorized by its charter, its conduct is, in a sense, illegal and a wrong to the state, which has an interest in restricting within due bounds, for the public good, the scope of corporate action. Furthermore, those who become members of a business corporation contribute their capital for the accomplishment of such purposes only as are specified in the charter or articles of association, and do not expect, nor are they bound, to hazard it in some different undertaking.

All persons dealing with a corporation are bound

to take notice of its powers, for its charter or articles of organization, unlike articles of copartnership, are matter of public law or record.

Acts and contracts beyond the scope of the purposes for which a corporation is created, as defined by its charter, are said to be *ultra vires*, meaning, literally, beyond the lawful power or authority, not of any particular officer or agent, but of the corporation itself. Thus, should the board of directors of a bank, even by resolution duly made, attempt to authorize its agents to issue policies of insurance, the acts of such agents in so doing would be *ultra vires*.

§ 519. **The effect of ultra vires acts and contracts.**—We can not note here in detail the effect of *ultra vires* contracts, both because of the magnitude of the subject and the conflict of authorities. But it is settled law that if the unauthorized contract is wholly executory on both sides, either the corporation or the other party may set up as a complete defense that it was beyond the power of the corporation to make it.

Where the corporation has had the benefit of performance by the other party it will not be heard to say that the contract was *ultra vires* while retaining the fruits of the unauthorized transaction. Either it will be liable upon the contract itself, or else, in courts where such liability is denied, it will be liable in equity or otherwise to restore or pay for what it got, and conversely, when the corporation has in good faith performed its part.

A corporation is liable for its torts substantially to the same extent as an individual and it is no defense that the tort was committed while engaged in an *ultra vires* transaction.

§ 520. **Remedies for ultra vires acts.**—The directors of a corporation may be answerable to the corporation itself or to the shareholders for damage resulting from embarking its capital or property in *ultra*

vires transactions, and a single stockholder may bring suit to restrain them. Finally, the state may, through its appropriate officers, move in the courts to restrain unauthorized acts or to forfeit the charter of the offending corporation.

§ 521. **Foreign corporations.**—It is generally laid down that a state can not, by chartering a corporation, confer upon it a legal right to act within the jurisdiction of another state. By the reciprocal courtesy and good-will of states, however, the right to do business within their borders is quite generally given to corporations organized under the laws of other states. But this right or privilege is subject often to numerous qualifications and restrictions. A foreign corporation has no right to do in another state what is unauthorized by the charter granted by its home state, nor can it lawfully make any contract abroad which is contrary to the letter or policy of the law there prevailing.

And though a corporation is, in one sense, a person, and is a resident of the state creating it, it is not a citizen in the sense that it is entitled to "all the privileges and immunities of citizens in every other state," so as to prevent another state from excluding it altogether from doing business within its borders, or from discriminating between it and its own citizens or corporations by imposing special taxes or license fees, unless such tax or license would be an interference with interstate commerce. It is a citizen of the state creating it, however, wherever rights of property are involved, within the meaning of the clause of the constitution which extends the judicial power of the United States to controversies between citizens of different states.

How Corporate Contracts Are Made.

§ 522. **Seal—Drafting and execution.**—It is well settled that where a corporation is not specially re-

stricted as to the mode of contracting, its contracts may be made just as a natural person would make them, and the corporate seal need only be used in executing such deeds and instruments as would require a seal if they were executed by individuals. The corporation may adopt as its seal whatever device it sees fit.

A deed or contract of a corporation should be so drawn that the name of the corporation appears in the body of the instrument, and not the name of the officer or agent who signs, seals or acknowledges it. The name of the corporation should be signed to the instrument, and then should follow the word "by" and the signature of the officer or agent and the word agent, or his official title.

CHAPTER XXXV.

LIABILITY OF SHAREHOLDERS TO CREDITORS.

§ 523. **Under statutes.**—Independent of special statute or charter provisions, a shareholder, the full par value of whose shares has been paid in to the corporation, whether by himself or some previous owner, sustains no personal liability to the creditors of the corporation, even though it be insolvent, unless he has participated in or benefited by some act impairing the corporate capital when viewed as a trust fund for creditors, or has expressly agreed to be bound. It is this feature of immunity from personal liability which attracts investors in corporate stocks, and leads, in many cases, to the formation of incorporated companies in preference to partnerships. At present, however, charters and general incorporation laws often provide that the shareholders in corporations formed under them shall be subject to some individual liability to creditors, though their stock is fully paid up. In a few states the liability is general for all of the company's debts, but oftener it is restricted to an amount equal to the par value of the stockholders' shares, and in some the liability exists only as to certain classes of creditors, as servants and laborers.

§ 524. **Liability of shareholders to creditors where capital is impaired.**—Independent of statute, a shareholder may be individually liable to the creditors of the corporation where it is insolvent and its capital is impaired. The liability may arise: (1) Where his subscriptions have never been paid to the corporation in money or its equivalent, or (2) where, though his subscriptions were fully and honestly

paid in, he has participated in the wrongful diversion or withdrawal of the capital of the company to the injury of its creditors.

§ 525. **Same—The trust fund doctrine.**—The capital stock of a corporation is the fund or resource with which it is enabled to commence and transact its business, and is the basis of credit held out to the public, upon the faith of which third persons are presumed to trust it. In short, it has been said that the capital stock of a corporation is, in equity, a trust fund for the payment of its debts. Creditors, therefore, have a right to demand that it shall be fully paid in, to the extent that it has been subscribed, so long as its payment is necessary to the satisfaction of their debts; and that when once paid in, that it shall remain unimpaired so long as their security demands it, except so far as it may be lost by the risks incident to the regular prosecution of the business. Full powers of management are usually reserved to the company, however, up to the point where the assets of the corporation are brought into court for distribution.

Unpaid subscriptions are as much a part of the capital and property of a corporation as its factory or roadbed. If they have been called in they are legal debts due the company, which its creditors can reach by garnishment or execution. But even though no call has been made, subscriptions are equitable assets which can be reached by creditors with the aid of a court of equity, which will authorize a receiver to make a call to such an extent, not exceeding the subscriptions, as may be necessary to pay the corporate debts. Where insolvency is threatened stockholders frequently seek to evade the payment of their subscriptions by various schemes and devices which courts are usually able to defeat.

§ 526. **Same—Shareholders receiving back capital.**—Not only have corporate creditors a right to insist that the corporate capital shall be fully paid in

as subscribed, if this be necessary to the payment of their debts, but they are entitled to have the capital left in, and to follow it and demand it, if it is wrongfully diverted into the hands of the shareholders. Thus, if the corporation, under the guise of paying dividends, there being no profits, actually distributes its capital among its shareholders, the creditors may follow it into the hands of the stockholders receiving it, if they can not otherwise realize their debts.

CHAPTER XXXVI.

DISSOLUTIONS AND WINDING UP OF CORPORATIONS.

§ 527. **Causes of dissolution.**—The dissolution of a corporation takes place when it loses the franchise which it derived from the state to act in a corporate capacity. After such franchise is lost the members of the association may remain together and assume to act as a corporation, but such action would be illegal, and would, in many cases, render them liable as partners.

The dissolution of a business corporation and the extinction of its franchises may occur in either of the following ways:

(1) By expiration of its charter.

(2) By surrender of its franchise with the consent of the state.

(3) By legislative enactment if no constitutional provision be violated.

(4) By forfeiture of its franchise and judgment of dissolution obtained in a proper judicial proceeding.

§ 528. **Expiration of charter.**—If a corporation was chartered to exist for a limited time, or until a certain day, its charter will expire by its own limitation at the expiration of the time or the arrival of the day named.

The corporate existence may also be limited to expire upon a contingency, as where the charter of a railroad company provides that unless it shall begin and complete its road within a certain time, its corporate existence and powers shall cease.

§ 529. **Surrender of franchises to the state.**—If

the whole body of stockholders agree to a surrender of the corporate franchises to the state, and the latter accepts such surrender, the corporation is dissolved. But whether the majority of the stockholders have a right to make such a surrender as against a dissenting minority may not be clear and has been sometimes denied where the corporation was solvent. Uncertainty also exists as to the method by which a surrender should be accepted by the state, or whether any acceptance is necessary in the case of a mere private corporation not charged with the performance of public duties. In many of the states, however, a method of dissolution is prescribed by statute.

§ 530. **Legislative enactment.**—The federal constitution[1] provides that "no state shall pass any law impairing the obligation of contracts." The charter of a private corporation is held to be a contract between the state on one hand and the corporation on the other, within the meaning of this provision, and hence, unless the charter itself, or the general law existing prior to the formation of a corporation, reserves to the state the power of amendment or repeal, the charter can not be altered or repealed by the legislature without the consent of the members of the corporation.

§ 531. **Dissolution at the suit of the state.**—A private corporation may be dissolved for a misuser or nonuser of its franchises in a proceeding instituted by the state for the purpose of forfeiting its franchises and right to exist as a corporation, and in which the cause of forfeiture and the forfeiture itself are judicially ascertained and declared.

Continued, willful and flagrant usurpation or abuse of power on the part of a private corporation will induce the courts to forfeit its franchises at a suit of the state. Combining with others to form an unlawful trust, habitually violating its charter by engaging in unauthorized transactions, filing false

[1] § 10, art. 1.

statements of its financial condition, have severally been held to warrant dissolution. Mistake or accidental excess in the use of power is not a cause of forfeiture.

§ 532. **Same—Nonuser.**—With an ordinary trading or manufacturing company the state has little concern whether it carries on business and makes use of its franchises or not. But where the company is possessed of other franchises besides that of being a corporation merely, the public may have a direct interest in their proper and continued exercise. For a railroad or a telegraph company to abandon its business and refuse to continue it for the public benefit justifies a judgment of dissolution.

The statutes of many states have also provided that certain circumstances, such as insolvency and neglect to pay debts for a specified time, or a neglect to use its franchises, and a cessation of business, shall be deemed a dissolution.

§ 533. **Consequences of dissolution.**—Under the rules of modern equity the property of a corporation, including debts due it, is as much a trust fund for the payment of creditors after dissolution as before, and the right of the stockholders to share in it after the debts are paid is fully recognized and protected. When a corporation is dissolved, therefore, courts of equity will lay hold of its property and funds and distribute them, first, in the payment of corporate debts, and then, if there be anything remaining, it will be distributed among the shareholders who are the real donors or investors. Statutes have been passed in many states to facilitate the winding up of the affairs of dissolved corporations, to prevent the abatement of actions pending by and against them at the time of dissolution, and providing that they may sue and be sued as a corporation for a certain time after dissolution takes place.

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CHAPTER XXXVII.

SALES OF PERSONAL PROPERTY.

Nature and Formation of the Contract.

§ 534. **Sale defined and distinguished.**—A sale of personal property may be defined to be a transfer of the general or absolute property in a thing for a price in money.

A sale is distinguished from a gift by the presence of a consideration, and from a barter by the fact that the consideration is money paid or promised to be paid, a barter being the exchange of a chattel for something other than money.

Most important to be borne in mind, however, is the distinction between a present sale of chattels and a contract to sell them in the future, though the term sale is sometimes loosely applied to both. The former is always called a sale; the latter is often (and more properly) called a contract to sell, or an executory sale. The effect of a present sale of goods is to divest the seller of the title to the thing sold and vest it in the buyer. This change of title may take place if the parties so intend, even though the possession remains with the seller, so long as there is something in existence belonging to the seller which is capable of present sale. If the sale is executory, the goods remain the property of the seller until some further act or event converts the executory contract into a complete and perfect sale.

The distinction between an executed and executory sale is important. Thus, it is clear that if the contract is an executed sale, and the property has passed to the buyer, any subsequent loss or damage

to the goods must fall upon him, because he is the owner of them.

Until the sale becomes executed, the buyer has a mere personal right against the seller to demand performance of the contract. He has no title to the goods, but only a right to demand that the seller shall give him title and possession according to the executory agreement, enforcible by an action for damages.

Formation of the Contract.

§ 535. **Who may sell.**—The ordinary rules as to contract capacity apply to contracts of sale. It is a general rule in the common law, however, that no one but the true owner, or some one by his authority and on his behalf, can make a valid sale. But even at common law there are apparent exceptions to this general rule.

A thief or finder can give no better title than he himself has, and it makes no difference that the purchaser acted honestly and in ignorance of the true ownership, paying full value for his purchase. The owner may claim his property or its value from the last or any intermediate purchaser, however innocent. The principal exception to this rule applies to money and negotiable instruments, payable to bearer or indorsed in blank, a matter already explained.[1]

A party who has obtained possession of goods by fraud from one who has no intention of selling to him can give no title, even to a bona fide purchaser for value. But where one who has obtained a sale to himself by fraud resells the goods to an innocent purchaser, who pays value for them, without notice or knowledge of the fraud, such second purchaser obtains a good title, and can not be deprived of the goods by the party defrauded.

A purchaser for value is one who actually paid the price before he had notice or knowledge of the fraud. Whether one who has taken goods in payment of a

[1] *Ante*, § 255.

pre-existing debt is a purchaser for value within this rule, the courts are not agreed.

§ 536. **Consideration—Price.**—The presence of a money consideration, paid or promised, is the distinguishing feature of every sale. If the consideration be something other than money, the transaction is a barter or exchange. But the law of sales is quite generally applicable to contracts of barter, so that the distinction between sale and barter is of little practical importance.

An express bargain as to price will, of course, control. But where no price has been agreed upon, the law implies a reasonable price. The market price at the time and place of delivery is ordinarily adopted as determining what is reasonable. The price may be left to be determined by third parties, but if they refuse to act there can be no sale.

§ 537. **Of the thing sold.**—One can not make a valid present sale of what he does not own. But a promise to deliver in the future what the seller expects to raise or make, or to go into the market and procure, is binding as an executory contract.

Where the contract is for the future sale of specific chattels, and before the time for the performance of such contract arrives the goods are destroyed, the contract is at an end and the purchaser may recover back whatever of the price he may have paid, as upon a consideration that has failed. But where the contract is for the future sale and delivery of chattels not specific, the destruction of the property with which the seller expected to discharge his contract will not excuse him from obtaining and delivering other property of the kind agreed upon.

The things sold must have an actual or potential existence. Thus, one may sell all the wool his sheep may produce during a season, but not all the wool that may be produced by the sheep he may afterward acquire. So one may sell the future earnings of a present employment, but not the earnings of a

prospective employment. So a sale or mortgage of a crop already planted is usually valid, and the same is often held where the sale is of a crop not yet planted, provided the mortgagor already owns the land upon which it is to be grown.

The Statute of Frauds.

§ 538. **In general.**—The common law recognized the validity of verbal contracts for the sale of personal property without regard to the amount involved. But the seventeenth section of the statute of frauds changed the English law upon this subject, and has become the basis of similar legislation in America. The seventeenth section of the English statute provides that "No contract for the sale of goods, wares, and merchandise for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum of said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."[1]

§ 539. **Contracts for work, etc.**—Where the thing to be delivered is to be manufactured or is to have work and labor bestowed upon it before delivery, the cases are not agreed as to whether the statute applies or not. The English and some American courts hold that where the ultimate object of the contract is to effect the transfer of chattels from A to B for a price greater than the statute limit, the statute applies, though the thing was to be first made or finished. But in New York, if the subject-matter of the contract is to be entirely manufactured, the stat-

[1] Similar enactments are found in every state except Arizona and Delaware, though different limits of value are adopted. The usual limit, however, is $50. In Arkansas, Maine, Missouri and New Jersey the limit is $30, New Hampshire $33, California and Idaho $200, Vermont $40, Montana and Utah $300, Florida and Iowa no limit, the other states $50.

ute does not apply, the contract being deemed a bargain for labor and materlals. But even there, if articles already in existence are to be merely finished, the statute applies.

In Massachusetts and some other states, if the goods are such as the seller habitually manufactures in the course of his business, the statute applies, but not where the thing is made upon the special order of the buyer according to plans or details furnished by him, so that it would not have been made in the special form or shape in which it was made except for the order given. There are still other refinements, and some conflicting decisions.

§ 540. **Sale of choses in action.**—In many states the statutes expressly include sales of things in action, and the tendency of the decisions in other states is to give a broad meaning to the words "goods, wares and merchandise," and to hold that such choses in action as are commonly sold and assigned, as negotiable instruments, stocks, etc., are goods, wares and merchandise, within the meaning of the statute.

§ 541. **Price or value.**—If several different articles are sold at the same time, but for different prices, the sale is within the statute, if the aggregate price exceeds the statute limit, provided the several purchases may fairly be regarded as included in one iransaction, though the price of no one article is above the statute limit.

§ 542. **Methods of satisfying the statute—The writing.**—Having seen what contracts are within the statute, it remains to consider what steps must be taken in order to make a binding contract in cases of sales involving price or value beyond the statute limit.

The law requires, in such cases, either—

(1) Part payment; or,

(2) Acceptance and receipt by the buyer; or,

(3) A written note or memorandum of the contract.

Any one of these three things will satisfy the statute and render the sale valid and enforcible.

If the contract itself is in writing, no note or memorandum is required. But if the sale is oral, then the note or memorandum, made at any time after the bargain is struck, and before an action for its enforcement is brought, will satisfy the law.

In sales by auction, however, the auctioneer's memorandum must be signed on the spot.

The memorandum is of no effect unless signed by the party to be charged, or his authorized agent.

The general requisites of the memorandum are substantially the same under this as under the fourth section, previously discussed.

§ 543. **Delivery, acceptance and receipt.**—In the absence of the note or memorandum just described, the sale becomes binding if the seller delivers and the buyer accepts and receives the goods or some part of them. But something more than mere delivery is required. Delivery is the act of the seller; acceptance and receipt are acts of the buyer. The seller must manifest his intention to relinquish possession of the goods in favor of the buyer, and the buyer must take possession or control of them in the capacity of buyer. In other words, he must take them with intent to acquire an interest in them adverse to that of the seller. Mere delivery by the seller is not enough if the buyer refuses to take possession of the property, disclaims the contract, and refuses to receive the property.

Acceptance and receipt need not be at the time of the contract. It is enough that they take place subsequently, pursuant to the oral agreement.

§ 544. **Earnest and part payment.**—Part payment is the third alternative. A mere offer of payment will not render the contract valid. The seller must actually accept and receive something of value in discharge of some portion of the price.

CHAPTER XXXVIII.

WHEN THE TITLE PASSES.

§ 545. **Sale of specific chattels unconditionally.**—As a general rule a contract for the sale of a specific or ascertained chattel will be considered executed or executory, according to the manifest intention of the parties. But when there has been no manifestation of intention the law presumes that a present sale was intended, and the title passes at once, provided the thing sold is agreed upon, and is ready for immediate delivery. This rule is universal where the price is paid or credit is expressly given. Indeed, many cases hold that the title is presumed to pass at once, though the price has not been paid, even where the sale is for cash, the seller having a mere lien for the price, which entitles him to retain the goods until payment is made or secured. There is much authority, however, for the rule that where the sale is for cash the title remains in the seller until the price is paid, unless the seller voluntarily delivers the goods without requiring payment in advance.

But even where the sale is of a specified or ascertained thing, it is presumed that the title is not intended to pass if anything remains to be done to put the goods into deliverable shape, as where they are to be weighed, measured, or separated from a larger mass. But this presumption is not conclusive, and it may be shown that it was the intention of the parties that the title should pass and the goods be at the buyer's risk, though the seller was bound to weigh, measure, separate or finish them afterward.

Sale of specific chattels conditionally.[1]

§ 546. **Sale of chattels not specific.**—A contract for the sale of what the buyer does not own, but expects to go into the market and get, is always executory until the property is procured and appropriated to the contract. And where goods are to be manufactured, no title is presumed to pass until they are finished and the buyer has had reasonable opportunity to inspect them and take them away

§ 547. **Goods ordered from a distance.** — Where, in the ordinary course of business, goods are ordered from a distance, it is generally understood that the dealer will supply them out of his general stock, or procure them from other persons in time to fill the order. No title passes, therefore, until specific goods are appropriated to the contract. But such appropriation is usually deemed to take place and the title and risk to pass to the buyer when the seller has delivered the quantity and quality ordered, to a carrier named by the buyer, or, if none be named, then to a usual and proper carrier. But this is a mere presumption, and it may be shown that the title was not intended to pass until the goods were actually delivered to the buyer.

§ 548. **Same—Reservation of right of disposal.**— Notwithstanding the general rule that delivery to a carrier as above raises a presumption that the title passes instantly, the seller may, by appropriate words or acts, reserve the title to himself until the price has been paid or some other condition of the sale has been performed. As a bill of lading is a symbol of the property itself, the seller who takes a bill of lading directly to himself or his agent is almost conclusively presumed to reserve the title to himself. He ships the goods and retains the bill of lading until the price is paid or secured, whereupon he or his agent indorses it to the buyer, who, having

[1] *Post*, Chap. XLI.

then acquired the document representing the goods, acquires the title also.[1]

Where goods are consigned to a carrier, with directions to collect on delivery (C. O. D.), it has been held that the title passes to the buyer upon delivery to the carrier. But whatever may be the correct view as to this, the buyer has no right to the goods until the price is paid.

§ 549. **Delivery as against third parties.**—At common law neither payment nor delivery were necessary to a valid sale as between the parties. But as against third persons, creditors of or subsequent purchasers from the vendor, the delivery of the goods is of the utmost importance. The fact that a sale of goods is not accompanied by delivery and followed by change of possession of the thing sold, raises a presumption of fraud in favor of third parties who subsequently purchase the goods while still in the possession of the seller and without notice of the prior sale, and also in favor of the creditors of the seller whose attachments are levied while the goods are still in his hands. One reason for the rule is that the buyer, by permitting the seller to remain in possession after the sale, clothes him with apparent title to the thing sold, and thus enables him to deal with it as his own, as by selling it again, or by contracting further debts upon the credit of what he apparently owns.

Without going into the refinements of the subject, it may be stated as the prevailing rule in this country, that an absolute sale of chattels unaccompanied by a change of possession, is presumptively fraudulent and void as to the creditors of the vendor and subsequent purchasers from him who take possession of the property in good faith and for a valuable consideration without notice or knowledge of the prior sale. But the transaction is only prima facie fraudulent. Being so, the vendee may show that the retention of

[1] Further as to bills of lading, see *post*, § 719.

possession by the vendor was consistent with an honest purpose. If the first purchaser fails to establish the honesty of the transaction, however, the subsequent purchaser or attaching creditor will hold the goods.

In view of the reason of the rule requiring change of possession in order to enable the buyer to hold the property against third parties, the delivery must be of such a nature as will put them upon inquiry for a change of ownership. The law requires immediate delivery where that is possible. If the goods are so situated, however, as to be incapable of immediate delivery, it will be sufficient, as a rule, if the vendee takes possession as soon as he has a reasonable opportunity to do so. This would be so of a ship or cargo sold while at sea. Where the articles are so bulky as to be incapable of immediate manual delivery, it is generally held sufficient for the vendor to show the property to the vendee and authorize him to take possession, provided the latter takes actual possession with such reasonable dispatch as the nature of the thing will admit of.

CHAPTER XXXIX.

OF THE WARRANTIES ACCOMPANYING THE SALE.

§ 550. **Caveat emptor.**—*Caveat emptor* (let the buyer beware) is the maxim of our law, which operates to throw upon the purchaser the risk as to the quality of the goods, unless they are open to his inspection, or there be fraud or a warranty.

§ 551. **Warranty—Nature and consideration.**—A warranty is an assurance of some fact coupled with an agreement, express or implied, to make the assurance good or pay for the deficiency. It differs from a condition in that its breach does not usually entitle the purchaser to rescind, but gives him a right to demand damages of the seller, though this distinction is not always recognized.

Where the warranty is made at the same time with the sale, the consideration for the sale supports the warranty. But where the sale is at one time and the warranty is given later, it must be founded upon a new consideration.

§ 552. **Kinds of warranties.**—Warranties are either express or implied, and relate either to quality or title. An express warranty of one quality usually excludes an implied warranty of any other quality but not an implied warranty of title. Where a contract of sale is completely written, no oral warranty can be shown, unless it amounts to a fraud.

§ 553. **Implied warranty of title.**—Under ordinary circumstances every vendor of personal property who has possession of it in person or by agent impliedly warrants and affirms by the very act of sale that he is the owner of the property, free from any lien or incumbrance. But the purchaser is entitled to sub-

stantial damages only where he has been compelled to yield to the superior rights of third persons or to remove an incumbrance on the goods.

§ 554. **Implied warranty of quality—Goods bought from manufacturer.**—Where goods are bought from a manufacturer there is an implied warranty that they are free from latent defects arising from the process of manufacture rendering them unfit for the purpose to which such goods are usually put, provided such latent defects could have been guarded against by ordinary care and diligence.

§ 555. **Same—Sales by sample.**—In sales by sample there is an implied warranty that the bulk shall conform to the sample. But if the sample be defective the purchaser can not complain of the same defects in the bulk. So the mere fact that a sample is shown will not raise an implied warranty of conformity if the purchaser inspects the bulk and bases his judgment upon such inspection. The question is whether the sale was made solely with reference to the sample exhibited.

§ 556. **Same—Goods sold by description.**—Where goods are sold by description there is an implied warranty that they shall be of the kind or description contracted for. Thus, where an article was described as "winter-pressed sperm oil," it was held a warranty that the article was not only sperm oil, but "winter-pressed," as distinguished from "summer-pressed," the latter being an article of much less value.

But it must not be forgotten that a sale by description does not imply a warranty that the goods are of any particular quality, but only that they are salable among merchants as goods of the kind or species bargained for.

§ 557. **Fitness for particular purpose.**—Where one buys goods for a particular purpose, communicated to the seller, there is an implied warranty that they shall be reasonably suited to the use intended.

Thus, if one buys barrels to be filled with whisky, there is an implied warranty that they will not leak. So, if one buys hay for feeding cattle, there is an implied warranty that it is fit for feeding. But there is no implied warranty of fitness when the buyer himself selects the article, or directs how and of what material it shall be made.

§ 558. **Express warranty.**—No particular form of words is required to constitute an express warranty. Any positive affirmation with respect to the quality or fitness of the properly sold, intended as a warranty by the vendor and relied upon as such by the vendee, will amount, generally, to an express warranty. And even though the vendor holds a secret intention not to warrant, if his words fairly import a warranty, and are relied upon as such, he is bound. But it is often difficult to distinguish between mere puffing or dealer's talk on the part of the vendor, which is neither intended or relied upon as a warranty, and a positive affirmation to influence the buyer and actually relied upon by him. Mere estimates of value are not warranties, as a rule, nor are simple words of praise, commendation or opinion.

§ 559. **Remedies for breach.** — Commonly, the remedies of the buyer, where a warranty has been broken, are either a suit for its breach or by rescission and return of the property, a matter elsewhere discussed.[1]

[1] *Post*, § 581.

CHAPTER XL.

PERFORMANCE OF THE CONTRACT AND THE REMEDIES FOR ITS ENFORCEMENT.

§ 560. **In general.**—It is the duty of the seller to make delivery of the goods, and of the buyer to take and pay for them in accordance with the contract of sale. Unless it is otherwise agreed, the duty of the seller to deliver and of the buyer to pay the price are so far concurrent that the seller can not maintain an action for the price unless he tenders delivery of the goods, nor can the buyer sue for non-delivery unless he is ready and able to pay the price.

§ 561. **Seller's duty as to delivery.**—By delivery as here used is meant such a transfer of possession to the buyer by the seller as will enable the latter to successfully defend an action for non-delivery.

The duty to deliver is not generally perfect and enforcible until the purchaser has complied with all conditions precedent upon his part to be performed. Thus, if payment is by express agreement to precede delivery, no action can be maintained against the seller for non-delivery until payment is made or tendered.

§ 562. **Place of delivery.**—Ordinarily, in the absence of special agreement, the seller is not bound to send or carry the goods to the buyer. It is enough that the seller places the goods at the buyer's disposal at his (the seller's) place of business, if he has one, or, if not, at his residence; or if the sale be of specified goods, then at the place where they are or are understood by the parties to be at the time of sale.

If some other place of delivery is expressly specified, delivery must, of course, be made at that place. So general usage or a previous course of dealing between the parties may designate some certain place of delivery, or may make it the duty of the seller to send or carry the goods to the buyer.

§ 563. **Same—Delivery to carrier.**—Delivery of goods ordered from a distance to a carrier selected by the vendee, or if none be selected by the vendee, then to a carrier designated by usage, or, in the absence of usage, to a fit and proper carrier, changes the title and puts the property at the risk of the consignee during transit.[1] Yet the seller must follow the directions, if any, of the buyer, and if he deviates from them the risk of delivery is upon him.

§ 564. **Time of delivery.**—Where the contract expressly provides that the seller shall send or carry the goods to the buyer, but is silent as to the time, they must be sent or carried within a reasonable time. Where the delivery may be at any place, a tender of the goods at such a reasonable hour as will enable the buyer to examine and receive them is sufficient.

§ 565. **Quality and quantity.**—The quality and kind of goods to be delivered depends upon the terms of the agreement and the conditions and warranties which accompany it. But the seller is bound to afford the buyer a reasonable opportunity to inspect the goods in order to ascertain whether they conform to the terms of the contract.

Ordinarily the seller must tender the exact quantity bargained for. The buyer is not bound to accept a less quantity, nor may the seller, by sending the goods mixed with others, impose upon the buyer the trouble and inconvenience of a separation.

§ 566. **Acceptance by the buyer.**—What constitutes acceptance sufficient to bind a purchaser under the statute of frauds has been discussed. In the

[1] *Ante*, § 547.

present connection acceptance is important chiefly as evidence that the goods conform to the contract, and hence that the buyer is bound to pay for them. If, as a matter of fact, the goods do conform to the contract and the purchaser refuses to accept them when properly tendered, the seller may pursue one or the other of the appropriate remedies discussed hereafter.

Where the goods come into the actual possession of the buyer, who, having had a reasonable time for inspection, retains them without objection, this is taken as evidence, almost or quite conclusive, that they conform to the terms of the bargain.

§ 567. **Payment and tender.**—Payment, as we have seen, may be a condition precedent to the passing of the title. But where a sale is expressly upon credit with no reservation of title to the seller until full payment is made, the buyer is entitled to immediate possession.

Remedies by Action and Against the Goods.

§ 568. **Seller's remedies for buyer's breach.**—There are two forms of breach by the vendee for which the vendor may seek a remedy: (1) The buyer may wrongfully refuse to receive the goods in pursuance of the contract; or (2) he may, after receiving them, fail or refuse to pay the price.

§ 569. **Where goods delivered.**—If the title and possession have both passed to the purchaser, the vendee's sole remedy is an action for the price, unless there is fraud or other wrong warranting rescission. Where the price is fixed by the contract, the measure of damages will be such price, with interest, usually from the day when it fell due, and if no price is fixed by the contract, then a reasonable price will be implied.

§ 570. **Goods not delivered—Resale.**—Where the buyer wrongfully refuses to take possession of the

goods in conformity with the contract, the seller usually has a choice of remedies. He may regard the contract as rescinded, treat the goods as his own, and sue for damages. As he can not have both the goods and their value, the measure of his recovery is usually the difference between the contract price and the market value at the time and place of delivery.

The seller may, after a reasonable time, if the buyer refuses to accept and pay for the goods tendered him in strict conformity with the contract, resell the same in the capacity of *quasi*-agent of the buyer, after notifying the latter of his intention so to do. If the goods then bring less than the contract price the vendor is liable for the deficiency and the reasonable expenses of resale. If they bring more than the purchase price and expenses the surplus belongs to the buyer.

The sale must be conducted with fairness, so as to obtain the fair value of the property, otherwise the price obtained will be disregarded and the damages will be the difference between the contract price and the market value. The sale must be made within a reasonable time, and should be at a market at or near the place of delivery. It may be either public or private. Not only is the buyer entitled to notice that the goods will be resold, but it is the safer course to notify him of the time and place of sale.

Other Special Remedies of the Seller.

§ 571. **Lien.**—By the common law the vendor has a lien upon the goods sold for the unpaid purchase-money so long as it is actually due and the property remains in his possession. But the lien exists only where the title has passed, for one can not have a lien upon his own So he must have the possession, and if he voluntarily delivers the goods to the buyer, the lien is gone.

There must be a debt for the price in order that a

lien may exist. If the goods are expressly sold upon credit, without any bargain as to the possession, the bargain for credit is said to be a waiver of the lien, and the buyer may demand immediate delivery without payment. But even where the sale is on credit, if the vendor actually remains in possession until the price becomes due, his lien revives, and he may withhold delivery until payment is made. And if the buyer is found to be insolvent, or becomes so, if the seller is still in possession he may hold the goods, even though the price is not yet due.

The vendor's lien is waived and extinguished if he voluntarily delivers the goods to the buyer or his agent without requiring payment of the price.

Payment extinguishes the debt for the price, and with it the seller's lien. So, a valid tender destroys the lien and entitles the buyer to immediate possession.

§ 572. **Stoppage in transitu.**—Stoppage *in transitu* is the right of the unpaid vendor to regain possession of the goods while they are being transported to the buyer, and to hold them until the price is paid, upon his discovering that the buyer has become insolvent or was insolvent at the time of the sale. This right is said to be based upon the plain principle of natural justice, "that one man's goods should not be taken to pay another man's debt," and is closely analogous to a resumption of the vendor's lien.

§ 573. **Who may stop.**—Not only a vendor strictly speaking has the right to stop the goods, but an agent who has himself paid or become responsible for the price of goods shipped to his principal, may stop them *in transitu* as against the principal.[1]

The following conditions must exist to warrant the vendor in stopping the goods in transit:

(1) The goods must be unpaid for.

(2) They must be in transit.

(3) The buyer must be insolvent.

[1] *Ante*, § 390.

§ 574. **Price must be unpaid.**—Absolute payment extinguishes the right to stop the goods, for it is solely to enforce payment that the right is given. And as to what amounts to payment the student is referred to the title "payment." Part payment has no effect to extinguish the right. All the goods may be stopped to secure any part of the price, unless the contract is apportionable.

§ 575. **Must be in transit—When transit begins and ends.**—The right of stoppage must be exercised while the goods are legally in transit, that is, in general, intermediately between their delivery by the seller to the carrier and their delivery by the carrier to the buyer.

The transit ends when the carrier divests himself of the possession of the goods in the capacity of carrier in favor of the buyer or his agent, by an actual or constructive delivery of the goods.

Delivery to the buyer or his agent at an intermediate point puts an end to the right of stoppage *in transitu*.

§ 576. **Resale during transit.**—If the buyer, while the goods are in transit, resells them to a third party without any agreement or understanding with the vendor, the latter may still stop them before the transit ends, by their delivery to such purchaser or his agent. But there is an exception to the rule. Thus, if a bill of lading is given to the purchaser who transfers it to a sub-vendee, who pays value for the goods without notice or knowledge that the price is unpaid, the right of stoppage is gone.

§ 577. **Insolvency of buyer.**—This is the last requisite to the exercise of the right of stoppage. And the vendor who stops acts at his peril, for if the buyer is not insolvent, within the meaning of the law, the seller is liable to him in damages for his wrongful interference with the goods.

It is not necessary, however, that the buyer should be insolvent in the technical sense of that term;

though technical insolvency always justifies a stoppage. It is sufficient if the seller can show the buyer's general liability to pay his debts in the ordinary course of business, or that he has so conducted his affairs as to afford ordinary and apparent evidences of insolvency.

§ 578. **How the right is exercised.**—The seller need not regain actual possession of the goods. It is enough if the carrier is notified to hold them subject to the seller's orders. Notice must be served on the carrier, not upon the buyer, and in season to enable him to communicate it to his servants in time to prevent delivery.

§ 579. **Effect upon other remedies.**—After the goods are stopped, the vendor's remedies are practically the same as if the goods had never left his hands. Thus, he may maintain an action for the price and levy upon the goods themselves, or may exercise the right of resale. The sale is not rescinded. The buyer can not recover part payments previously made, and may tender the price and claim the goods at any time before the vendor has exercised the right of resale.

§ 580. **For non-delivery.**—Where the seller fails or refuses to deliver the goods in accordance with the contract, the buyer may sue for damages, the usual measure of which, if the price is unpaid, is the difference between the contract price and the market value of each installment at the time and place of delivery. If no place of delivery is provided, the contract price should be compared with the market price at the place of sale on the day when delivery should have been made.

Where the price has been paid, the buyer may recover, as damages for failure to deliver, the full market value of the goods, at the time and place of delivery, with interest.

§ 581. **For breach of warranty.**—Where the sale is of specific chattels, the buyer can not, by the

weight of authority, rescind the contract for a mere breach of warranty unless the right of rescission is expressly reserved. His remedy is to retain the goods and sue for the difference between their actual value and their value had they been as warranted, or to use the breach of warranty as a counter-claim when sued for the price.

But where unascertained goods are sold by sample or description, the buyer is entitled to a reasonable time to ascertain whether they correspond with the sample or description. If they do not correspond he is not precluded by the mere receipt of them for examination from rescinding the contract, provided he acts promptly and has done nothing to impair the rights of the seller, though, if he does not rescind, or has waived the right to do so, he can still set up the breach of warranty as a means of recovering damages or as a counter claim. But in case the warranty was fraudulently made, the buyer may rescind for the fraud, or ratify the sale and sue either as for a breach of warranty or for deceit.

CHAPTER XLI.

CONDITIONAL SALES.

§ 582. **Definition—Classes.**—A conditional sale is one by which the right of property in chattels is to vest in the buyer or be defeated and revested in the seller upon the happening or not happening of some event. A condition may be either precedent or subsequent. If the title is to pass only upon the happening of some event or the performance of some act, the sale is upon condition precedent, for a condition precedes the vesting of the title in the buyer.

A condition subsequent is one upon the non-fulfillment of which a title already vested in the buyer is to be defeated or modified. Thus, one may sell goods, reserving to himself the right to repurchase at a specified price within a certain time. If he elects to exercise the right within the time specified the prior sale is defeated.

§ 583. **Conditions are express and implied.**—An implied condition is one that arises through construction or intendment of law. Thus, where there is no bargain for credit, the payment of the price is regarded by many courts as an implied condition precedent to the passing of the title. That the goods shall be of the same kind, description or species with those bargained for is often spoken of as an implied condition precedent in sales. So, weighing, measuring or finishing by the seller is usually an implied condition precedent to the passing of the title. Express conditions arise from the language of the parties. The words, "upon condition," usually indicate a condition.

§ 584. **Payment by installments—Rights of vendor.**—It is very common to sell pianos, sewing machines, household furniture and a multitude of other things on the installment plan. Possession is given to the buyer with the understanding that the title is to remain in the seller until all of the installments of the price are paid. At common law, in such cases, the title remains with the vendor until all of the installments are paid, and he may retake the goods upon default in the payment of any installment, without returning the whole or any part of what has been paid. But the vendor may waive the forfeiture expressly, or even by implication, as when he receives an installment after it is due. The harsh rule which permits the vendor to declare a forfeiture for default in any installment is sometimes limited by statute, and in some states the courts allow the seller to recover the property only upon refunding the installments paid, less a reasonable sum as damages.

§ 585. **Same—Rights of bona fide purchasers.**—According to most cases a purchaser from the conditional buyer, though he purchased without knowledge that the goods were sold upon condition that the price should be paid before the title should pass to the buyer, may be compelled to return them to the seller if his vendor defaults in the payment of the price. But in some of the states a bona fide purchaser may hold as against the conditional vendor, notwithstanding default in the payment of installments.

Since the enactment of laws requiring the registration of chattel mortgages, conditional sales of this class are held void in some states as against bona fide purchasers, unless they are recorded, or possession is retained by the seller, upon the ground that they are to be regarded as chattel mortgages within the mischief sought to be remedied by the acts, and in other

states special statutes require the recording of such sales unless possession remains with the seller.

§ 586. **Sales to arrive.**—Where goods are sold while still in course of transportation the contract assumes one of three forms:

(1) The goods may be sold with the express agreement that the title shall pass immediately, when it vests at once in the buyer. If an accident happens to the goods during the remainder of the transit the loss is upon him. The indorsement of the bill of lading during transit is presumed to pass the present title and risk to the buyer.

(2) The goods may be expressly sold "to arrive;" the title remains in the seller until their arrival at the point of destination, when neither party is bound unless the goods arrive as stipulated.

(3) The vendor may expressly warrant that goods of a certain quality, quantity or description shall arrive by a given time, and where such an intention clearly appears, the vendor will be liable for damages if they do not arrive as warranted.

§ 587. **Sale on trial—Sale or return.**—Goods are often delivered to one proposing to buy with the understanding that he may try them, and return them if they prove unsatisfactory, and have back whatever he may have paid upon the contract. If it is understood that the title is to remain in the seller until the trial is over, the purchaser is merely a bailee in the meantime and is not liable for any loss or injury to the goods before the sale becomes absolute, unless it be caused by his negligence or other fault. This is called "sale on trial."

But it may be agreed that the title to the goods shall pass immediately to the buyer, subject to the right to return them if they prove unsatisfactory. This is called a "sale or return." He may return them to the seller if they prove unsatisfactory. Yet if they are lost or damaged before they are returned as unsatisfactory, the loss falls upon the buyer, even

though he may not have completed his trial or examination. If he fails to return them in the same condition in which he received them the sale becomes absolute, whatever may be the cause of his default.

Whether the transaction is a sale on trial or a sale or return, the buyer becomes absolutely bound if he fails to return the goods within the time stipulated, if any, or, if none be fixed, then within a reasonable time, unless, in the case of a sale on trial, the goods are lost without his fault.

Where one buys a thing or has it made to his order, to be kept if it proves satisfactory, it may not be entirely certain how far he is bound to try the thing, or to be satisfied with it after trial. By the weight of opinion, in such cases, the buyer has a right to return the thing if he is honestly dissatisfied after a fair trial, and it is not enough to deprive him of the right that he ought to be satisfied.

CHAPTER XLII.

MORTGAGES OF PERSONAL PROPERTY.

CHATTEL MORTGAGES.

- I. Nature of.
  - a. At common law.
  - b. In equity and under statutes.
- II. Requisites.
  - a. The property.
  - b. Form.
  - c. Recording.
  - d. The debt secured.
- III. Incidents.
  - a. Possession and profits.
  - b. Sale by mortgagor.
  - c. Assignment by mortgagee.
- IV. Discharge.
  - a. By payment.
  - b. By tender.
- V. Rights and remedies after default.
  - a. Of mortgagor.
    - 1. To redeem at law.
    - 2. To redeem in equity.
  - b. Mortgagor's remedies.
    - 1. By sale.
    - 2. By foreclosure in equity.

§ 588. **Definition and nature.**—A formal mortgage of personal property (chattel mortgage) is a conditional sale of it as security for the payment of a debt, the condition being that the sale shall become void and the title shall revest in the seller upon his paying or performing as agreed. If the seller fails to pay or perform at the appointed time, then, at common law, the title becomes vested absolutely in the buyer without foreclosure or other proceeding in or out of court, and no redemption is possible.

The party giving the mortgage is called the mortgagor; the party receiving it is the mortgagee.

§ 589. **In equity and under statutes.**—But it is the generally established doctrine of equity that the mortgagor of chattels may, after default, and at any

time before a valid public sale of the property to satisfy the debt, bring a suit in equity to redeem upon payment or tender of the debt with interest. Statutes in some states have expressly provided for redemption of mortgaged chattels after default in payment.[1]

§ 590. **What may be mortgaged.**—Only such things as are capable of actual present sale can be mortgaged. At common law a chattel mortgage can not, as a mortgage, be made to cover property that the mortgagor does not own at the time but expects afterwards to acquire. It is generally held in equity, however, that a mortgage of property which the mortgagor does not own at the time the mortgage is given, is subject to the lien of the mortgage when he actually acquires it.

A growing crop may be mortgaged as a chattel and is generally deemed to be sufficiently in existence when the seed is in the ground. Many, though not all the cases, refuse to recognize as valid a mortgage of a crop not yet planted.

§ 591. **Form and requisites.**—Since a mortgage is valid, as a rule, only as between the parties thereto, unless the mortgaged property is delivered to and possession retained by the mortgagee, or the mortgage itself is recorded in a specified public office,[2] chattel mortgages are almost invariably in writing. The mortgage may be in any form, provided the intention to make a mortgage is clear. It need not be under seal. In a few states, however, it is required that a chattel mortgage be duly acknowledged by the mortgagor, and in some the wife of the mortgagor must join in a mortgage of exempt property.

[1] In Michigan, North Dakota and Oregon the mortgagee is regarded as having a mere lien until foreclosure, and the property may be redeemed by a simple tender of the debt and interest at any time before an actual sale.

[2] *Post*, § 593.

§ 592. **Same—Description of the property.**—The mortgage must so describe the property that it may be identified, and oral evidence is not admissible to show that the parties intended the mortgage to cover property excluded by, or not fairly included in, the terms of the description. In order to give the instrument general validity, it must contain such a description as will enable third parties, when aided by inquiries which the description indicates and directs, to identify the property. Where the articles are very numerous, as a stock of goods, it is sufficient to describe them generally, as the stock of furniture or dry goods being in a certain store.

§ 593. **Recording.**—In nearly all the states it is provided, in substance, that chattel mortgages shall be void as against the creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith, unless possession of the mortgaged property is delivered to the mortgagee, or unless the mortgage is filed or recorded in a designated public office in the manner prescribed by law. Under these statutes an unrecorded mortgage is valid as between the parties, whether possession is delivered to the mortgagee or not. The object of the recording laws is the protection of third persons, creditors of and innocent purchasers from the mortgagor who retains possession, by giving them notice of the incumbrance. Recording, in most states, is equivalent to change of possession, and is notice to the world of existence of the mortgage.[1]

§ 594. **The debt.**—The debt secured should be described with sufficient fullness and accuracy to distinguish it from other debts of the mortgagor, and a totally wrong description of it avoids the mortgage.

[1] In some states a chattel mortgage ceases, after a certain time, to be valid as against subsequent purchasers or incumbrances of the mortgaged property, unless the mortgage, or a copy of it, or an affidavit showing the amount still due, is filed within thirty days or some other short period before the expiration of the time named.

A mortgage may be given to secure a contingent liability, as that of a surety or indorser, and a chattel mortgage is valid if given in good faith to secure future advances.

§ 595. **Possession and profits of mortgaged property.**—In most states, unless the mortgage otherwise provides, the mortgagee is entitled to the possession of the property, both before and after default. Yet it is commonly agreed that the mortgagor shall remain in possession until default, and in some states it is held that the mortgagor is entitled to possession until the condition is broken or until foreclosure, unless otherwise agreed. It is a common provision in chattel mortgages, however, that the mortgagee may take possession whenever he deems his security unsafe, and many cases hold that the mortgagee's right to take possession under such a clause does not depend upon his having reasonable grounds for believing himself unsafe, though other cases deny such arbitrary power.

§ 596. **Sale by mortgagor.**—A sale by the mortgagor before default gives his vendee a right at law to redeem by payment or tender of the debt and interest when it falls due. After default, however, the mortgagor has a mere right to redeem in equity, called an equity of redemption. Yet he may sell this equitable right and the purchaser may redeem in like manner with the original mortagor.

§ 597. **Assignment.**—The mortgagee's interest may be transferred, either before or after default. This is done by assigning the mortgage and the debt thereby secured. Without discussing the matter at length, an assignment, both at law and equity, should be of the debt and mortgage both. If the debt secured is evidenced by a non-negotiable instrument the assignee takes the mortgage, tainted with all defects which attach to it in the hands of the mortgagee, and any defenses will be available against him which could have been set up against the mortgagee. But in

most states, if the debt is evidenced by a negotiable instrument, a bona fide purchaser of the debt and mortgage takes both debt and mortgage, freed from defenses.

§ 598. **Discharge of mortgage.**—A mortgage of chattels, being at law an absolute sale of them, subject to be defeated by the performance of a condition subsequent, that is, by the payment of the mortgage debt, it follows that whatever extinguishes the mortgage debt discharges the mortgage. A tender of payment on the day the debt falls due will discharge the mortgage, though the mortgagee refuses to receive it. But a tender of payment, made after default does not operate to revest the title in the mortgagor, unless it is actually accepted by the mortgagee, except in states where the mortgage is considered a mere lien.[1]

In many states, by statute, the mortgagor is entitled to receive from the mortgagee a written certificate that the mortgage has been satisfied and discharged, and this certificate is recordable in like manner with the mortgage itself.

§ 599. **Mortgagor's rights and remedies after default.**—If the mortgagor fails to pay the mortgage debt when due, at common law the title to the property becomes absolute in the mortgagee, and the mortgagor's rights therein are gone. But equity regards a chattel mortgage as a mere security, and will, even after default, allow the mortgagor to redeem by payment of the debt and interest. He must, unless permitted by statute to redeem by making a tender after default, sue in equity to redeem, and the court will permit him to do so upon just terms, the general requirement being that he shall pay the debt and interest into court. Statutes often regulate the matter of redemption.

[1] *Ante*, § 589.

§ 600. **Mortgagee's rights and remedies after default.**—After default the mortgagee's title is absolute at law. The legal title of the mortgagor is altogether defeated and cut off. All that remains to him is the equitable rights to redeem, as above. The mortgagee, as legal owner, is entitled to the immediate possession of the mortgaged goods, and may bring replevin for them if possession is withheld.

He may retain the property merely, and let the mortgagor redeem if he will, or he may take active steps to cut off this right of redemption and subject the property to the payment of the mortgage debt. The process whereby the mortgagor's right of redemption is cut off is called a foreclosure.

§ 601. **Foreclosure.**—This may be by a suit in equity, which differs in no essential particular from the foreclosure of a real estate mortgage. Such a proceeding is always best where the property is of considerable value or the rights of the parties are in dispute, as it is seldom open to a charge of unfairness. But the mortgagee may, usually, after notice to the mortgagor, proceed to make a bona fide sale of the property. The sale may be by a public auction, or, if there is a power in the mortgage authorizing it, it may be private.

Statutes in the various states regulating sales by mortgagees should be consulted and strictly observed, both as to the notice usually required to be given to the mortgagor and the manner of conducting the sale.

BAILMENTS.

EXCEPTIONAL BAILMENTS.
CARRIERS OF PASSENGERS.
INNKEEPERS.

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- b. Bound for a high degree of care.
- c. Are insurers of baggage.
- d. Are liable for ordinary care.
  - 1. When passenger keeps possession.
  - 2. When baggage not seasonably removed.

Innkeepers.

Status...
- a. Duty to receive guest.
- b. Liable as an insurer.
- c. Limiting liability.
- d. Lien.

CHAPTER XLIII.

BAILMENTS.

General Principles.

§ 602. **Bailment defined.**—A bailment is a delivery of some chattel by one party to another, to be held according to the specified purpose of the delivery, and to be returned or delivered over when that purpose is accomplished.

The party so delivering the property is called the bailor; the party receiving it the bailee; the property itself is called the thing bailed, and sometimes, the subject-matter.

§ 603. **Same—Test of bailment.**—Unless the very chattel delivered is, by the express or implied agreement of the parties, to be returned, the transaction is usually deemed a gift or sale and not a bailment. If it is to be returned, however, it is still a bailment, though it is to be returned in altered form, as where hides are delivered to be tanned into leather, or logs are delivered to be sawed and restored or delivered over as lumber. But where one receives property to be consumed, under an agreement to return, not the identical thing but another thing of like kind, he is a purchaser and not a bailee, and is not excused from making the return, as are most bailees, by showing that the property was lost or destroyed without his fault. It is a sale to be repaid in kind.

§ 604. **Kinds of bailments.**—The books ordinarily distribute bailments into the following classes: (1) Deposit: A bailment of goods delivered by one man to another to be kept gratis for the benefit of the

bailor. (2) Mandate: A delivery of goods to somebody who is to carry them or do something to or about them gratis. (3) Loan for use: Where goods or chattels are lent to a friend gratis to be used by him. (4) Pledge or pawn: Which is a bailment of chattels as security for some debt or engagement. (5) The different sorts of hiring, namely: (a) Hire of things, where the bailee pays for the custody and use of the bailed thing. (b) Hire of services, where the bailor hires the bailee to bestow labor and skill on the bailed property. (c) Hire of custody, where the bailee is to keep and care for the property for reward. (d) Hire of carriage, where the bailee is to transport goods from place to place for hire.

From the foregoing it will be seen that a further classification is possible, and that bailments are: (1) Beneficial to the bailor alone, as in the case of deposit and mandate; (2) beneficial to the bailee alone, as in the sole case of loan for use; (3) beneficial to both parties, as in the case of pledge or pawn and in the different sorts of hiring.

Bailments have also been classed as *ordinary* and *exceptional*. The ordinary bailments will now be discussed, leaving the exceptional ones for examination later on.

Ordinary Bailments—General Principles.

§ 605. **Consideration in bailment.**—If one promises to keep or carry or work upon the goods of another without reward, he is not bound to enter upon the undertaking because there is no consideration for it. But if he receives the goods and enters upon the execution of the trust, the law deems the act of the bailor in entrusting them to him a sufficient consideration to support an express or implied promise on his part to use at least slight diligence in the performance of his undertaking.

§ 606. **Degree of care required of bailee.**—That

every bailee is required to take some care of the bailed property is everywhere settled. But what amount of care or degree of diligence will be required of the bailee under the varying circumstances of the case is a vexed and constantly recurring question.

In dealing with cases of bailments, most courts recognize three degrees of care, namely: (1) Slight care, (2) great care and (3) ordinary care, with their corresponding degrees of negligence. The absence of slight care is gross negligence; the absence of ordinary care is ordinary negligence; and the absence of great care is slight negligence. It is further said that where the bailment is for the sole benefit of the bailor, as in the case of deposit and mandate, the bailee is bound to take slight care of the thing bailed and is liable for gross negligence only; if the bailment is for the benefit of both bailor and bailee, as in pledge and the different sort of hiring, ordinary care is required of the bailee who will be answerable for ordinary negligence; if the bailment is for the benefit of the bailee only, as in the single case of loan for use, the bailee is bound to great care and will be answerable for slight negligence.

What constitutes negligence in any of these several degrees is not an abstract question, and can only be determined with reference to the facts and circumstances of the particular case. Thus, what would be great diligence in reference to a wagon or to a load of bricks would often constitute gross negligence with respect to a bag of money or a package of valuable securities. Not only the value and intrinsic qualities of the thing bailed are to be considered, but also the character and habits of the community and the usages of trade, and the character and habits of the bailee himself, if these are known to the bailor.

Subject to some exceptions,[1] the bailor may contract for a greater or less degree of care than above

[1] *Post*, § 668.

indicated, provided he does not seek to escape the consequences of willful misconduct.

If the bailor knows beforehand the place where and manner in which his goods are to be kept, he can not complain if they are lost or damaged solely by reason of their being kept in the place and in the manner in question.

§ 607. **Negligence where bailment tortious.** — Where the bailee has obtained the property by theft, trespass or fraud, or, having obtained possession lawfully, he persists in retaining it after his right to do so has been terminated, or asserts a title adverse to that of the bailor, or abuses his possession by putting the thing bailed to some unauthorized use, as where he hires a horse for one journey but goes another, he is absolutely responsible for any loss or damage to the property, whether due to his negligence or not.

§ 608. **The bailee's special property.**—The bailor has the general or absolute title to the thing bailed, and the bailee has, at most, what is called a *special property* therein. This special, limited or qualified property or interest gives him a right to hold the property both as against the bailee, before the bailment is lawfully terminated, and as against third persons interfering with or doing damage to it. But the bailee can not, of his own motion, set up an adverse title in a third person in answer to a suit by his bailor. He can only set up such adverse title where the third party has asserted it, and he has delivered over the goods in recognition of it.

§ 609. **Bailee must re-deliver unless he has lawful excuse.**—The bailee must restore the thing bailed to the bailor or his agent or nominee at the end of the term for which it was delivered, and his refusal to do so on demand, in the absence of lawful excuse, will render him liable for its value. If the bailee delivers the property to one whom he mistakenly thinks is the true owner, he is liable absolutely to

the bailor. The property is to be returned, ordinarily, at the place it was received, unless the bailee has stipulated to return it elsewhere.

§ 610. **Excuses for non-delivery.**—The bailee may show, however, in excuse for non-delivery—

(a) That he has, by compulsion of law, or even without suit and after demand, delivered the goods to the true owner, who is some one other than the bailor, or has been notified by such true owner not to deliver them to the bailor.

(b) That they have been lost while in his hands, without negligence or other fault on his part.

§ 611. **Bailee's right of lien.**—Every bailee for hire, who, by his labor and skill, has imparted an additional value to the property, has a specific lien thereon for his reasonable charges. This is true of mechanics, artisans, laborers and tradesmen who receive property for the purpose of manufacturing or repairing it, or otherwise improving its condition, as by killing and packing hogs, or repairing watches, furniture or vehicles. But unless the property is actually or presumptively enhanced in value by the service rendered, the common law gives no lien; hence an agister or livery-stable keeper has no lien, independent of statute, for the mere keep on an animal, though otherwise if he had taken it to train or cure. Livery-stable keepers and agisters are now quite generally given a lien by statute. But custom has given to warehousemen who merely store property, a lien for their charges, and the same is true of factors to whom goods are consigned for sale. Common or public carriers, and perhaps private carriers, have a lien for their charges, upon the goods carried. Like other common law liens, the lien of a bailee is dependent upon possession, and voluntary delivery of the property to the bailor is a waiver of the right.

CHAPTER XLIV.

BAILMENTS CONTINUED.

For Benefit of Bailor.

§ 612. **Deposit.**—A deposit has been defined as a bailment of goods to be kept without reward and delivered according to the object or purpose of the original trust. The principal object of such a bailment is the gratuitious keeping or storing of the bailed thing. A deposit of this sort is sometimes called a special deposit, to distinguish it from another class of transactions, not bailments at all, but loans creating debts to be repaid at all events, sometimes called general deposits. Of this last class are ordinary deposits in banks.

§ 613. **Degree of care—Gross negligence.**—It is usually laid down that a bailee without reward is bound to take but slight care of the thing bailed to him, and is liable, consequently, only for gross negligence. Gross negligence does not mean the absence of all care, but merely the absence of such care as every man of common sense, however inattentive, takes of his own property. Of course, for robbery or larceny happening without his fault, the bailee is not responsible.

§ 614. **Right to use—Other matters.**—The depositary has, in general, no right to use the thing deposited, particularly where it will be injured by use. Other matters pertaining to simple deposits are governed, in the main, by the general rules of bailment law heretofore laid down.

§ 615. **Mandate.**—Commission or mandate is a

bailment of personal property to be carried or worked upon without reward. The distinction between deposit and mandate is simply this: In deposit the principal object of the parties is the custody of the thing, and any service or labor performed upon it is merely accessorial; in mandate the services are the principal object of the parties and the custody is merely accessorial. The contract of mandate is governed, in the main, by principles analogous to or identical with those applicable to bailments in general and deposit in particular.

For Bailee's Benefit.

§ 616. **Loan for use.**—"Loan for use" is the sole bailment for the benefit of the bailee. The bailee or borrower gets the use of the chattel lent during a fixed time or during the bailor's pleasure without rendering anything to the bailor therefor. The contract itself, being of secondary importance from a commercial standpoint, will be dismissed with a word.

The bailee, being the sole party benefited, is bound to take great care of the thing bailed and is liable for slight negligence, though not for inevitable accident.

He must defray all ordinary and necessary expenses connected with the thing loaned, though the bailor is probably liable to reimburse him for any extraordinary expenses necessarily incurred in preserving it.

CHAPTER XLV.

MUTUAL BENEFIT BAILMENTS.

Bailments for Hire.

§ 617. **In general.**—Bailments for the benefit of both bailor and bailee are numerous and important. When one hires a horse, a bicycle, or a piano, for use, when he delivers his furniture, grain or other property to a warehouseman or other person to be stored for hire, when he employs a watchmaker or other artisan to mend his watch or other chattel, or a manufacturer to make up his raw material and return it as manufactured stock, or delivers property to be carried for hire, or to be kept as security for debt, a mutual benefit bailment arises.

§ 618. **Standard of care and responsibility.**—Except where the bailee is an inn-keeper or common carrier, ordinary care is the standard of responsibility in all these cases, unless the parties have bargained for diligence of greater or less degree.

Hire for use.

§ 619. **Definition.**—Where one obtains the custody and use of another's chattel for a consideration, paid or promised, the bailment is called *hire for use*. It is distinguished from a loan by the presence of a consideration.

§ 620. **Bailor's duties.**—It is the duty of the bailor or letter to give the bailee or hirer possession of the thing hired at the place and time agreed, and to refrain during the term of letting from interfering in

any way with his use of the property in the manner contemplated by the contract. Unless the bailee expressly assumes the risk of his bailor's defective title, the latter is probably liable in damages to the hirer, if he is dispossessed by one having paramount title. Against trespassing strangers, however, the bailee must protect himself. Generally, the letter impliedly warrants that the thing let is safe and fit for the purpose for which it was hired.

§ 621. **The hirer's duties.**—Of the hirer's duty to pay for the use and enjoyment, little need be said. If he has the use, but does not pay, he is a debtor in default and may be sued. If payment is to be in advance of the delivery for use, he can not sue for non-delivery without a tender of the hire.

The hirer is bound to use ordinary care for the safety and preservation of the hired thing. If he puts it to a use not warranted by the contract, however, he becomes strictly answerable for any loss or damage happening while such use continues.

Hire of Services.

§ 622. **In general.**—Those who take the personal property of others into their possession to work upon it for hire are variously termed workmen, mechanics, artificers, or artisans. To such persons the rules and principles pertaining to hired bailees in general are usually applicable. Thus, the rule of ordinary diligence will determine the liability of a carriage painter or watchmaker who has taken a watch or carriage to repair.

§ 623. **Degree of skill.**—If the bailee represents himself as possessing more than the average of skill and knowledge in his particular calling, he must exercise it, otherwise he must use such care, skill and knowledge as the average of his craft possess and exercise.

Hire of Custody.

§ 624. **Definitions.**—Those who, for hire or reward, undertake the care and custody of the goods of others, are known both in business and in the law books by different names, thus:

WAREHOUSEMEN are those who keep buildings or places for the receipt and storage of goods and merchandise for hire;

AGISTERS are those who take the horses or cattle of others to graze or pasture;

LIVERYMEN are those who take horses to keep and feed;

WHARFINGERS are those who own or keep wharves for the purpose of receiving and shipping merchandise to or from them for hire.

§ 625. **Warehousemen and warehousing.**—Warehouses are known by different names. Grain elevators are one important class. So those who maintain stockyards are, for most purposes, deemed warehousemen, though a carrier who maintains such a place may be liable as carrier as to live stock there kept as an incident of its carriage. Safety deposit companies who provide vaults and boxes for the keeping of the valuables of their customers are in the nature of warehousemen.

§ 626. **Duty of warehouseman—Degree of care.**—It is the duty of the warehouseman to furnish a warehouse reasonably safe for the storage of property of the kind he undertakes to keep. If, owing to its unsafe or unfit condition, the goods are lost or damaged, he is liable to the bailor, unless the defect was one of which he did not know and could not have known by the exercise of ordinary care. And a warehouseman who agrees to store goods in a fireproof building will be liable if the goods are lost by reason of their deposit elsewhere.

The warehouseman is bound to take due and reasonable care of the goods committed to his custody.

What is reasonable care is a question for the jury to decide in view of all the facts and circumstances of the case. Things of little intrinsic value, as compared with their bulk, however, as in the case of pig-iron, might be left in the open air or in a shed, without any imputation of negligence.

§ 627. **Warehouse receipts.**—These are instruments issued by warehousemen, acknowledging the receipt upon storage of goods therein described, and promising to redeliver them to the bailor on demand or (usually) to his order. Such instruments are commonly considered as representing the property they describe, and their indorsement and assignment is generally regarded as equivalent in law to the delivery of the goods themselves. After such assignment the warehouseman is deemed to hold the goods as bailee of the transferee, and this is so though he has not been notified of the transfer or consented thereto. But it is held, in some jurisdictions, that unless the warehouseman has had notice of the transfer, and has assented to hold as bailee of the assignee, the transfer of such a receipt is not valid as against attaching creditors of the assignor unless the receipt was negotiable by statute. By statute, in most states, warehouse receipts have to a greater or less extent the qualities of negotiable instruments. In order to be negotiable, however, they must, by some statutes, be issued by those regularly engaged in the business of warehousing.

§ 628. **Warehouseman's charges and lien.**—The employment of a warehouseman implies an agreement to pay a reasonable sum for storage, unless there is an express agreement fixing the rate of storage, or unless it is agreed that it shall be gratuitous. Each successive owner of the goods who leaves them on storage is under an implied contract to pay therefor.

By general custom the warehouseman has a lien upon property stored with him as security for his

reasonable charges. It is a particular lien, and hence does not extend to a general balance of account. The lien covers only storage charges and not advances, except by custom or special contract.

§ 629. **Forwarders.**—Forwarding merchants usually combine with the business of warehousing the character of agents to forward goods to their destination according to the express or implied directions of the owner. So far as they are warehousemen, their duties have been stated. In forwarding the goods, however, they are bound to use ordinary care. They must conform to the directions of the shipper and must advise the consignee seasonably of the time and mode of shipment.

§ 630. **Wharfingers—Liverymen—Agisters.**—The liability of a wharfinger for goods entrusted to his care does not differ materially from that of a warehouseman, and he is entitled to a similar lien. But while a liveryman or agister is liable for want of ordinary care, he has no lien for his charges, in the absence of statute or special contract.[1]

[1] *Ante*, § 611.

CHAPTER XLVI.

MUTUAL BENEFIT BAILMENTS CONTINUED.

Pledge and Collateral Security.

§ 631. **Pledge defined.**—A pledge may be defined as a bailment of personal property as security for some debt or engagement. Where the property is of a tangible nature, the term "pledge" or "pawn" is applied. The word "pawn," however, is seldom used in the language of commerce, being confined to dealings with a special class of pledgees called pawnbrokers. Where the thing pledged is incorporeal, as in the case of bonds, bills, notes, corporate stocks, etc., the term "collateral security" is now generally used to describe the transaction.

The party delivering property in pledge is called the pledgor; the party to whom the property is thus delivered is called the pledgee.

§ 632. **What may be pledged.**—Corporeal property, such as furniture, jewelry and domestic animals, were the earliest subjects of pledge. But now every kind of personal property, corporeal or incorporeal, capable of transfer by delivery of the thing itself, or by an assignment of a written evidence of ownership, may be the subject-matter of a pledge. So, bills of exchange, promissory notes, bonds, shares of stock, deposits in bank, mortgages, policies of insurance, etc., may be pledged equally with chattels personal.

§ 633. **Delivery of property in pledge.**—To constitute a pledge the pledgee must take possession, and to preserve it he must retain possession. The mere agreement of the parties, without more, that

certain property shall stand as a pledge is not sufficient to create a pledge.

An actual manual delivery by the pledgor or his agent to the pledgee or his agent is always sufficient. But as this is sometimes impracticable because of the bulk, situation, or peculiar nature of the property pledged, a constructive delivery will often suffice. So, logs in a boom may be pledged by going in sight of them and pointing them out to the pledgee, and the delivery of warehouse receipts or bills of lading for goods stored or in transit is a sufficient delivery of the property symbolized thereby.

§ 634. **Same subject—Bills and notes.**—Bills and notes should be pledged by a transfer in the ordinary way by indorsement and delivery or by delivery only, according to the custom of merchants. That such a transfer carries with it the legal title may, at first, seem inconsistent with the idea of a pledge. But the transaction receives its legal character from the agreement of the parties that the transfer is for security merely, and the delivery in pledge, without indorsement, of a bill or note payable to the order of the pledgor or indorsed to him in full gives to the pledgee the equitable title merely, and he may be prevented from enforcing his security by whatever defenses would have been available against his pledgor.

§ 635. **Corporate stocks.**—Corporate stocks may be pledged. The transfer is accomplished in the same way as in case of an ordinary sale and transfer of the title, the pledgor taking back from the pledgee a writing showing that the shares are held in pledge, and not absolutely. To render the pledgee's security complete as against the pledgor, a mere transfer of the certificates indorsed in blank or in full is sufficient. But in order to invest the pledgee with full legal title, as against the corporation and the creditors of the pledgor, a transfer must be registered on the books of the company.

§ 636. **Possession must be retained.**—In order to keep alive the pledge security, the pledge must be retained by the pledgee. Yet, if the pledgor gains possession by fraud or force, or the goods are redelivered to the pledgor for some temporary purpose, as for repairs, the pledgee is not divested of his rights, but may recover the property itself or the value of his interest therein.

§ 637. **The debt secured.**—One may pledge his property for the debt of another as well as for his own. So, the debt secured may be absolute or contingent and conditional, liquidated or unliquidated, present or future. But if property is pledged as security for a specified debt, it can not, without the pledgor's consent, be held as security for any other demand.

§ 638. **Pledgee's duty—To care for pledge.**—The pledge benefits the pledgor by gaining him credit, the pledgee by securing his debt. The latter is bound, therefore, to take ordinary care of the thing pledged in the absence of a stipulation for a greater or less degree of diligence.

§ 639. **Pledgee's rights with respect to the property pledged.**—Both before and after default, and until the pledge is redeemed by payment or tender, or has been in some way foreclosed, the pledgee has a special property or interest in the thing pledged, and may sue either the pledgor or third parties for any unauthorized interference with his possession. But he has no right to use the pledged property if it would be appreciably injured by use.

§ 640. **Increase stands as security—Profits.**—A pledgee is entitled to hold in pledge the increase of property pledged, though he must account for it on final settlement with the pledgor. Thus, the pledgee of an animal may hold its young in pledge, and the pledgee of stock is entitled, both as against the pledgor and the corporation, if it has notice of its rights, to collect and hold the cash dividends thereon.

So, the pledgee of bonds or other interest-bearing securities is entitled to collect the interest as it becomes due and to hold it on the same terms that he holds the original debt.

§ 641. **Pledgee entitled to expenses.**—The pledgee is entitled to charge the debtor with whatever reasonable expenses are incurred in caring for and preserving the security. Thus, where a policy of insurance was pledged, the pledgee was allowed to charge in account the premiums paid by him during the continuance of the pledge.

§ 642. **Enforcement of the contract.**—The pledgee, on default by the pledgor, may resort to the ordinary remedy by suit to recover the debt without resorting to the pledged property, unless he has specially agreed to do so. Nor does recovery of judgment on the debt discharge the pledge, though it discharges the debt by way of merger.

§ 643. **Sale at common law.**—It is settled, at common law, that the pledgee of tangible property may, upon default, without resort to legal process, sell the pledge upon giving the pledgor reasonable notice to redeem.

In general the power to sell after default is qualified, in the absence of an agreement to the contrary, by three imperative conditions: (1) There must be a prior demand of payment; (2) a prior notice of the time and place of sale; (3) the sale must be by public auction.

§ 644. **Demand and notice.**—A demand of payment is always necessary where the debt is due "on call," or "when demanded," or upon the happening of some event within the sole knowledge of the pledgee. But even where such demand is unnecessary, notice of the time and place of sale is necessary, unless such notice has been waived by agreement. The object of this notice is to give the pledgor an opportunity to attend and see that the sale is fairly conducted, to enhance the price by obtaining bidders, and to re-

deem the goods if he is able and sees fit. The notice need not be in any particular form. The safest course in all cases, however, is for the pledgee to serve formal notice in writing. In a number of states sales of pledged property are regulated by statute.

§ 645. **Sales under powers.**—Quite frequently the pledgee is expressly given a power to sell upon default at public or private sale without notice to the pledgor. Such a power is coupled with an interest and can not be revoked. Under such a power the pledgee should not, if the pledge be divisible, sell more than is necessary to satisfy the debt. Neither can the pledgee, directly or indirectly, purchase at his own sale. If he does so the pledgor may still redeem.

§ 646. **Foreclosure in equity.** — Formerly the pledgee's only remedy was by suit in equity for a foreclosure, and authority to sell the pledge. A pledgee may still, in all cases, at his option, sue in equity to foreclose the pledge, and he should do so whenever the pledged thing is of considerable value, or his rights or powers are questioned, or it is impossible to give notice to the pledgor, as where he is absent or his whereabouts are unknown.

§ 647. **Surplus belongs to pledgor—Deficiency.**—Whenever the pledge is satisfied, either by judicial or non-judicial sale, the surplus beyond the debt, interest and expenses of sale belongs to the pledgor. If the proceeds of the pledged property are insufficient to pay the debt, the pledgee may recover the deficiency from the pledgor.

§ 648. **Pledgee's remedies—Negotiable paper—Stocks.**—In the absence of a power of sale contained in the pledge agreement, the pledgee of negotiable paper can not, like the pledgee of tangible property, sell the pledge at maturity, but must hold it and collect it when it falls due. But the rule is founded upon the convenience and presumed intention of the parties, as such securities have no certain market

value. Hence, in the case of long-time coupon bonds and other securities that are not expected to mature till much later than the debt, a power of sale may be presumed.

The pledgee of negotiable paper is bound to use due diligence in collecting it, and such diligence is substantially the same as is required of an attorney or other agent for collection.

In general, the remedies of a pledgee of corporate stocks and bonds are practically the same as in the case of tangible property.

§ 649. **Extinguishment of pledge.**—The extinguishment of the pledge otherwise than by voluntary surrender of the security to the pledgee or by foreclosure and sale may take place in various ways, thus:

Whatever extinguishes the debt extinguishes the pledge. Hence, payment, accord and satisfaction, release, and the like, terminate the security and entitle the pledgor to a return of the property. A tender of the pledge debt at maturity extinguishes the pledge. It must be kept good, however, in order to stop interest and throw the costs on the creditor, who may still recover the debt by action, though he can not resort to the pledge. A tender after default, if it includes interest accrued, will terminate the pledge. But such tender must be made before a lawful sale of the security, and must, according to many authorities, be kept good.

If the pledge property is lost or destroyed the security is at an end. The debt, however, is not affected unless the loss was due to the pledgee's negligence or fault.

CHAPTER XLVII.

THE EXCEPTIONAL BAILMENTS—CARRIERS.

§ 650. **Exceptional bailments in general.**—We now come to a class of bailments sometimes distinguished as *exceptional*. The business of some bailees is so intimately connected with the convenience and welfare of the public that they can not choose their customers, but must, within certain limits, treat all alike who offer to deal with them, and are held to a degree of accountability far exceeding that of ordinary bailees. The principal bailees of this class are common carriers and inn-keepers.

§ 651. **Kinds of carriers—Common carrier defined.**—Carriers of goods are either, (1) *Private carriers*, or (2) *Common or public carriers*. A private carrier is one who carries only occasionally and not as a public business or employment. A common or public carrier, on the other hand, is one whose regular calling or business it is to carry chattels for all who choose to employ and remunerate him.

Carriers without hire and mere private and occasional carriers are governed by the general principles of bailment law previously discussed, and negligence in some degree, or fraud, is at the basis of their liability. Neither are they bound to serve all alike, but may refuse to deal except with chosen customers.

The common carrier, on the other hand, exercises a public employment to which public policy has annexed the following peculiar and burdensome duties and responsibilities:

(1) A duty to accept and carry, without discrimination between individuals, up to the limits of his

facilities, all goods of the kind that he professes to carry, provided they are offered in proper condition for carriage, and his reasonable charges, if he so demands them, are paid in advance.

(2) A duty to carry and deliver the goods safely and with reasonable dispatch according to the directions of the shipper, unless he is prevented from so doing by one of the following causes:

(a) By the act of God or the public enemy.[1]

(b) By the act of the shipper himself.[2]

(c) By the public authority.[3]

(d) By the inherent nature or vices of the goods.[4]

(e) By some cause against which he has stipulated by a special contract with the shipper, just and reasonable in the eye of the law.[5]

Except as to these causes, the carrier is said to be an insurer without the privileges of an insurer, and it is no excuse that he was robbed by superior force, or that the goods were lost by fire due to the negligence of third parties.

Whatever may have been the origin of this strict liability, the reason for its retention in modern times is founded upon the great public importance of securing care and diligence from common carriers in the performance of duties in the highest degree essential to the public welfare.

§ 652. **Who are common carriers.**—In general, no one will be held liable as a common carrier, unless he has in some way held himself out to the public as ready to carry for hire as a business, goods of the sort he professes to carry. A mere occasional undertaking to carry goods will not make one a common carrier. Railroad companies conducting ordinary commercial lines are always common carriers, and the same is true of dispatch and fast freight

[1] *Post*, §§ 662, 663.
[2] *Post*. § 665.
[3] *Post*, § 664.
[4] *Post*, §§ 666, 667.
[5] *Post*, § 668.

lines which, though they do not own the cars and road themselves, engage in transporting freight through the agency and over the lines of others.

Within the same principle express companies are common carriers, and so of city expressmen who carry goods and baggage to and from railway stations, private houses and hotels. Owners of land vehicles not employed upon any fixed line, but carrying from place to place in the neighborhood, as expressman, carters and draymen, are common carriers if they hold themselves out generally to carry for hire, and vessels engaged in general carrying, whether propelled by steam or sails, are common carriers; and so of canal companies and lightermen, bargemen and boymen on the lakes, rivers or sea.[1]

§ 653. **What bound to carry and where.**—A common carrier is bound to receive and transport goods of the kind only that he professes to carry, and no action can be maintained against him for refusal to carry goods of a different kind. Neither is the carrier bound to carry by other than his customary means and route, though he may, by special contract, bind himself to do so.

§ 654. **Carriage must be for hire.**—One is liable as a common carrier only when working for his hire. If nothing is to be paid for the carriage, the carrier is liable only for negligence, and not as an insurer. But it is not necessary that the price of carriage be paid or tendered in advance. If the carrier receives the goods upon an express or implied promise of compensation he is chargeable as a common carrier.

§ 655. **When the carrier's liability begins—Delivery for carriage.**—The liability of the carrier begins with the delivery of the goods to him or to his agent authorized to receive them. Thus, merely

[1] Telegraph companies are not common carriers, nor are they bailees in any proper sense. They are bound like the common carrier, however, to serve the public impartially, and while they are not insurers of the safe delivery of messages, they are bound to use care and diligence in their transmission and delivery.

bringing goods onto the premises of the carrier without notice to him or his servants is, in the absence of express contract, usage, or a course of dealing between the parties warranting such delivery, insufficient to charge the carrier. So the delivery must be for immediate transportation in the usual course of business, and if the goods are delivered to be stored for a certain time, or until further orders, the carrier, in the meantime, is a mere warehouseman and liable only for loss occasioned by his lack of ordinary care.

§ 656. **Refusal to accept and carry.**—Though the common carrier must, in general, accept and carry what is offered or respond in damages, it is good ground for refusal that the goods are not of the kind that he professes to carry, or are improperly packed, and would subject his vehicle, or other freight, or his passengers, to risk of injury, or that the way is, at the time, exposed to extraordinary dangers, as from mobs or rioters. So it is a good defense to an action for refusal to carry, that from unexpected temporary causes or press of business it is impossible for him to carry at the time when the goods are offered.

§ 657. **May demand freight in advance.**—The law compels the carrier to deal with the public and leaves him no choice of customers. But it does not bind him to deal on credit, and he may lawfully refuse to carry unless freight is paid in advance.

§ 658. **The bill of lading.**—No receipt, bill of lading, or other writing is required to make the carrier liable as an insurer of the goods, delivered to and accepted by him for present carriage. In practice, however, the carrier's contract is usually embodied in some sort of written instrument, by which he often attempts, with more or less success, to limit or throw off the harsh conditions of the common law. These contracts assume somewhat different forms

and are known by different names. If the carriage is by water they are called bills of lading, if by land, they are called receipts. They are the same in effect in either case, being intended to evidence the true intent of the parties. In both cases they contain a description of the goods, acknowledge their receipt, in good condition or otherwise, as the case may be, name the shipper and consignee, state the terms of carriage and such qualifications of the carrier's liability as may be agreed upon between the parties, and contain a contract to carry the goods to their designation and to there deliver them to the consignee or his order. The term "bill of lading" will be used hereafter to signify any written contract of carriage, whether by land or water.

§ 659. **Both a receipt and a contract.**—A bill of lading is both a receipt and a contract. As a receipt it is prima facie evidence that the carrier has received the goods, but like other receipts it may be contradicted by oral evidence. So far as it is a contract the rule as to other written contracts applies, and it can not be varied or contradicted by parol.

§ 660. **How far bills of lading are negotiable.**—While bills of lading are sometimes said to be negotiable, they are not negotiable in the strict commercial sense. They are assignable, and are so far a representative or symbol of the goods that their transfer is equivalent to a delivery of the goods themselves. But even the bona fide purchaser of a bill of lading gets no title against the true owner where the bill was lost by the latter or was stolen from him, or the bill itself was issued for goods to which the consignor had no title. An assignment of the bill, however, to a bona fide holder for value cuts off the vendor's right of stoppage *in transitu*.

CHAPTER XLVIII.

CARRIER'S LIABILITY DURING TRANSIT.

Preferences and Facilities.

§ 661. **Liability at common law.**—By the common law, as elsewhere stated, the common carrier is an insurer of the goods he carries against loss or damage from any cause save the act of God or the public enemy. To these exceptions has been added, in modern times, exemption from liability for losses arising: (1) From the act of the public authority. (2) From the act of the shipper. (3) From the inherent nature of the goods.

§ 662. **Act of God.**—The carrier is not responsible for losses occasioned by the act of God unless he has expressly agreed to assume the risk. The phrase, "act of God," is hardly susceptible of accurate definition. It is nearly synonymous, however, with inevitable or unavoidable accident, when such accident is in no wise attributable to human agency, nor to the fault or negligence of the carrier. Thus, earthquakes, tornadoes, lightning and flood are clearly acts of God, and the carrier is exonerated from loss by reason of them where his negligence did not contribute to bring the property within their operation. But loss by fire, unless caused by lightning, is not due to the act of God.

§ 663. **Same—Public enemy.**—Losses caused by the public enemy fall, not upon the carrier, but upon the owner of the goods, provided, always, the carrier has been duly diligent in the discharge of his duty. Pirates and belligerents, and not mobs, rioters and

strikers, are "public enemies" within the meaning of the law.

§ 664. **Public authority.**—If the goods are damaged or destroyed by the public authority, as where goods infected with contagious disease are seized and destroyed, the carrier is not liable. Where the goods are taken from the carrier upon valid legal process against the owner, the carrier is, by many decisions, discharged. But it is the duty of the carrier in whose hands goods are attached to give the owner prompt notice of the facts.

§ 665. **Act of owner.**—Every man must bear the consequence of his own fraud and folly. Hence, if by his own fraud or intermeddling the owner has brought the loss upon himself, he can not recover. Thus, if a box or package is delivered to a carrier so disguised, whether by design or not, as to resemble a box or package such as usually contains articles of little value, whereby the carrier is misled, he will usually be liable, at most, for the value of such articles as he had reason to suppose he was handling. So, where the owner of the goods has accompanied them and has meddled with them, or has undertaken to direct how they shall be carried, or has unskillfully packed them, or has misdirected them, the carrier will be exonerated for all liability for losses due to such causes.

§ 666. **Loss caused by the inherent nature of the goods.**—For losses caused by the inherent nature, vice, defect or infirmity of the property carried the carrier is not liable, if not himself in fault. This principle applies to natural decay of fruits and vegetables, evaporation or fermentation of liquids, and the vicious and refractory nature of live stock.

§ 667. **Same—Live animals.**—The liability of common carriers of live stock is said to differ essentially from that of the carrier of inanimate property. In fact, it has been questioned whether a carrier of live stock incurs the liability of a common carrier at

all. But it is now quite generally conceded that a carrier of animals is liable as a common carrier, except for losses caused by their peculiar nature and propensities. But where an injury has happened to them, it is competent for the carrier to show that it occurred through the "proper vice" of the animals, as where they become frightened and trample upon each other, or gore each other, or die from heat or cold, or fright. But the carrier is bound to take such reasonable and prudent care of the animals as their known wants and propensities demand.

The carrier must feed and water live animals, unless the shipper or his servant accompanies them to look after their wants. Even then he must afford reasonable facilities and opportunity to feed and water.

Contracts Limiting Carrier's Liability.

§ 668. **Special contract — Stipulations against negligence.**—Except in a few states where statutes forbid, the carrier may, by express contract with the shipper, limit his liability for loss or damage to the goods, provided such contract be "just and reasonable in the eye of the law." And it is held by the courts of this country, with few exceptions, that the carrier can not, by any form of contract or agreement with the shipper, exempt himself from liability for the negligence in any degree of himself or his servants or agents, for such contracts are not just and reasonable in the eye of the law. But he may exempt himself from liability for loss or damage by fire or robbery, or for loss caused by delays due to mobs, rioters or strikers, provided his own negligence or wrong is not a contributing cause.

§ 669. **Stipulations as to value of goods.**—Contracts often provide that the carrier shall not be liable beyond a certain specified valuation unless the shipper shall, at the time of the delivery of the goods,

set a higher value upon them and pay an additional sum for carriage proportioned thereto. Such limitations are effectual where the loss is not due to the negligence of the carrier or his servants. Where the loss is due to such negligence, however, many cases hold that the carrier must answer for the full value of the goods. But where a valuation is fixed in advance by a contract fairly made with the shipper, with a rate of freight based on such valuation and intended to procure a due proportion between the amount for which the carrier may be held liable and the amount paid for transportation, and to protect the carrier from extravagant and fanciful valuations, he can not, by the weight of authority, be held for more than the agreed sum in any case.

§ 670. **Form of special contract—Notice.**—Except in Pennsylvania and North Carolina it is the well-settled general rule that the carrier can not, by mere notice by advertisements or placards, limit his common law liability, even though the contents of such notice are known to the shipper, unless the latter especially assents to be bound. As an apparent exception to this rule, the carrier may qualify his liability by a general notice to all who may employ him of any reasonable requisitions to be observed on their part in regard to the manner of entry and delivery of parcels, and the information to be given him of their contents, and the like, as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered and paid for accordingly. These matters the carrier has a right to know in order to fix his charges and to determine the extent of his risk and the precaution to be taken. But many cases hold that such notice, or even a special contract limiting the carrier's liability to a stipulated sum, will not prevent a recovery of the full value where the carrier has been negligent.

Carrier's Duty Touching Transportation.

§ 671. **Facilities and preferences.**—A common carrier is bound to furnish himself with such reasonable appliances and facilities for carrying as will enable him to take care of such traffic as may reasonably be expected to be offered. But he is not bound to provide in advance for any unusual press of business not reasonably to be expected.

He must provide safe and suitable vehicles in view of the particular kind of service he professes to perform. If he has neglected this duty, not even his special contract will protect him. If he carries by water he impliedly warrants that his ship is seaworthy, and if he carries by land he must furnish vehicles safe and sufficient for the purpose intended.

§ 672. **Discrimination in rates.**—The common carrier is entitled to charge a reasonable rate for carriage and no more. And without saying that it would be unlawful for the carrier under all circumstances to carry the goods of some for an unreasonably low rate, or even gratuitously, it may be affirmed, as a general rule, that the carrier can not, even at common law, unreasonably discriminate in the matter of rates, either by charging more than a reasonable rate to some, or less than a reasonable rate to others, with a view to create or with the effect of creating a monopoly and destroying the business of those less favored. The duties of carriers in this regard are the subject of statutory regulation in England and many of our states, as well as by a law of congress known as the interstate commerce act.

§ 673. **Time and order of carriage.**—All who apply are entitled, in general, to have their freight carried with reasonable dispatch in the order in which it is offered without partiality or favor. But in many cases the preference may, and even should, be given to perishable freight.

CHAPTER XLIX.

THE CARRIER'S DUTY TO DELIVER—HIS COMPENSATION AND LIEN.

§ 674. **Duty to deliver—In general.**—The last duty of the carrier is delivery, and to make it, unless prevented by the act of God or the public enemy, or by some risk expressly excepted in his special contract, is an implied term of his agreement with the shipper arising out of the very acceptance of the goods.

§ 675. **To whom.**—The delivery must be made to the consignee or his duly authorized agent. In the absence of any negligence, fraud or other default in the owner, this duty is absolute, and a wrong delivery will not be excused by the fraud or imposition of third persons, or mistake of the carrier.

§ 676. **Place of delivery—Railroads—Water carriers—Notice.**—Railways are not bound, in the absence of special contract or usage, to deliver the goods to the consignee personally at his place of business or residence. According to the Massachusetts courts the duty of the company is discharged by the safe deposit of the goods upon the platform or in the warehouse at the end of the transit, and from the time of such deposit its liability is that of a warehouseman and not of a carrier, even though no notice of the arrival of the goods has been given to the consignee.[1]

It was held in New Hampshire, however, that the

[1] This rule is followed in Illinois, Pennsylvania, Indiana, Iowa, Tennessee, Georgia, North and South Carolina, Missouri and California.

liability of the railroad company continued to be that of a common carrier, not only until the goods were deposited in the warehouse of the company, but until the consignee was afforded an opportunity, with due diligence, to take them away. This is said to be the rule also in Kansas, Kentucky, Ohio, Louisiana, Michigan, Minnesota, New Jersey, New York, Tennessee and Wisconsin. And when the consignee has been notified of the arrival of the goods, and has had reasonable opportunity to take them away, the carrier is liable as a warehouseman for negligence merely, and not as an insurer. The general rules last stated apply to water carriers in all jurisdictions.

Express companies are usually bound to make personal delivery, especially in the larger cities where they keep wagons and teams.

By accepting goods sent C. O. D., the carrier undertakes to deliver to the consignee only upon payment of the price, and becomes the shipper's agent to receive and bring it back. The carrier is bound to afford the consignee reasonable opportunity to inspect the goods before accepting them.

§ 677. **Excuses for non-delivery.**—We have seen that the carrier is excused from making safe delivery where the goods are injured or destroyed by certain risks or perils already treated of at length. But he may interpose as further excuse that the goods were stopped in transit by the shipper.

§ 678. **Rights of the carrier.**—The carrier has a special property in the goods consigned for carriage which, while the bailment continues, will justify him in resorting to whatever remedies an owner might pursue for their protection. If the goods be lost or injured through the negligence or wrong of a third party, the carrier may recover from such party, even to their full value, holding as trustee for the owner the excess over the value of his special interest.

§ 679. **Right to compensation.**—The carrier is

entitled to a reasonable compensation for his services. And he may demand its payment in advance as a condition precedent to the acceptance of the goods, or he may recover it by action after his service is performed.

§ 680. **The carrier's lien.**—A common carrier has a lien for his freight and advances upon goods carried, differing in no important respect from other particular or specific liens given by the common law.

The lien of a last or connecting carrier extends to freight advanced to prior carriers. Statutes in most states provide specially for the enforcement of carriers' liens.

CHAPTER L.

CARRIERS OF PASSENGERS—INNKEEPERS.

Passenger Carriers.

§ 681. **In general.**—Public carriers may carry both goods and passengers, upon the same or different conveyances. Where both the goods and the person of the owner are carried, the carrier is as to one a carrier of goods and responsible as such, as to the other he is a carrier of passengers.

§ 682. **Not insurers.**—While the carrier of passengers is not an insurer of their safety, he is bound to take great care for their protection, or, as has been variously expressed, "the most perfect care of a cautious and prudent man;" "the greatest possible care and diligence," and the like. The subject of passenger transportation is a large and important one. But a discussion, even of its leading principles, would crowd out matter of greater importance from a strictly commercial point of view. For this reason the topic will be dismissed with a brief consideration of the subject of baggage.

§ 683. **Baggage.**—The public carrier incurs as to the passenger's reasonable and ordinary baggage the same liability that he assumes with respect to goods carried as freight, though he is paid no compensation beyond what is included in the passenger's fare.

By baggage is generally understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, and which are not designed

for such use, but for other purposes, such as sale or the like. What will be considered baggage in any case must depend, in great measure, upon the age, sex, condition, and circumstances of the passenger, and the length, method, and object of the journey. So money to defray the expenses of a journey and carried in the trunk of a passenger, to an amount not exceeding what a prudent person would carry for that purpose, has been held to be baggage, though there are contrary cases. Bullion and plate are not baggage, nor are watches or jewelry unless intended to be worn on the person. Articles carried for sale, as merchandise and the samples of traveling men, are not baggage, unless the carrier, knowing their nature, receives them as such.

§ 684. **Passenger retaining possession.**—In order that a common carrier may be liable as such the thing carried must be completely and entirely surrendered to him. Where the passenger assumes and retains entire control of any article of baggage the carrier is not liable as an insurer, but only for negligence. This rule usually applies to clothing in present use, to money or jewelry on the passenger's person, and to a sachel carried in the hand.

§ 685. **Passenger must call seasonably for baggage.**—The passenger is allowed a reasonable time to call for and receive his baggage. Until such time has expired the carrier is liable as an insurer; afterward he is responsible as a warehouseman only. It is frequently held that the passenger can not continue the carrier's extraordinary liability by neglecting to call for his baggage until another occasion or another day, when it is transported by the same conveyance with himself.

Innkeepers.

§ 686. **Definitions.**—An inn, in the sense of our modern law, is practically the same as a tavern or

hotel, and an innkeeper is defined as one who regularly keeps open a public house for lodging and entertaining transient comers, upon the general expectation of his suitable recompense. One who supplies food only, and not lodging, is not an innkeeper.

§ 687. **Duty to receive the public.**—The common law duties of innkeepers are exactly similar to those of common or public carriers, for both are bound to serve impartially, up to the limit of their facilities, all who apply to them, and are liable to an action for a refusal so to serve unless they have just excuse therefor.

§ 688. **Who are guests.**—To be a guest, one must have the character of a traveler, and a traveler is none the less a guest though he may have made a contract for board by the week or month. But if one makes the inn his permanent home he lacks the character of a traveler and is a boarder merely. The distinction between a guest and a boarder is important, for, by the common law, the innkeeper is usually deemed an insurer of his guests' property upon the premises, against loss or damage save by the act of God or the public enemy, and has a lien thereon for his charges. With respect to the goods of a mere boarder, neither of these propositions hold good, though the place may be an inn as to those who have the legal character of guests.

§ 689. **Innkeeper may limit liability.**—An innkeeper may, by notice brought home to the guest, declare that he will not be responsible for money or valuables not specially deposited with him, and such notice will protect him from liability except where the loss was due to negligence on his part. But such notice must be shown to have been brought to the knowledge of the guest; mere posting of it is not enough. Statutes in several states, however, make such posting sufficient.

§ 690. **The innkeeper's lien.**—The innkeeper has a lien upon and may detain the goods of his guest as

security for his reasonable charges. But the keeper of a boarding-house has no lien by the common law, and the same is true of an inkeeper, as to the goods of a mere boarder. Statutes in many states now give boarding-house keepers a lien similar to or co-extensive with that of an innkeeper, and extend the lien of an innkeeper to the goods of boarders.

CHAPTER LI.

GUARANTY AND SURETYSHIP.

I. In general...
- a. Definitions.
- b. Parties and consideration.
- c. Statute of frauds.

II. Scope of the contract.
- a. Continuing and non-continuing guaranty.
- b. When notice of principal's default necessary.
- c. When creditor must sue principal.
- d. Guarantees of payment and collection distinguished.

III. Surety's rights after payment.
- a. To indemnity.
- b. To contribution.
- c. To subrogation.

IV. Discharge of surety.
- a. By payment.
- b. By release of principal.
- c. By giving time to principal.
- d. By alteration of contract.
- e. By release of co-surety.
- f. By concealment of principal's defaults.

§ 691. **Definition.**—Guaranty or suretyship may be defined as a contract, whereby one person, called the guarantor or surety, becomes responsible to another, called the creditor or obligee, for the debt, default or miscarriage of a third party, called the principal, or principal debtor.

§ 692. **Contracts of guaranty and suretyship distinguished.**—Guaranty and suretyship are often used as synonymous terms. While similar in many respects, the contract of a guarantor differs from that of a surety in some important particulars. The surety is bound jointly, or jointly and severally, with the principal, and often by a contract entered into at the same time and upon the same consideration, and may be sued jointly with the principal. Ordinarily he is held to know every default of his principal, and is not released by lack of notice that the latter has made default, or by the creditor's neglect to proceed against him, unless the surety requires him to do so.

The contract of the guarantor, on the other hand, is his own separate undertaking, often made upon a separate consideration, and upon which he must be sued alone. He undertakes, not that the principal will perform, but that he will be able to perform. For this reason he is often discharged by mere indulgence to the principal, or by the lack of a prior demand on the principal and seasonable notice of default. These distinctions, however, are often difficult of application, and there is some uncertainty as to the precise limits within which they operate.

§ 693. **Parties — Consideration.** — Here, as elsewhere in the law of contracts, the ordinary rules of capacity apply. Yet there are some special rules as to corporations and partnerships, as has already been shown.

Contracts of guaranty and suretyship, unless under seal, require a consideration to support them. But a consideration of one dollar is sufficient to support a contract of guaranty or suretyship for any amount, and, commonly, the only consideration for the contract is the credit given to the principal debtor at the express or implied request of the guarantor or surety. A binding agreement of the creditor to extend the time of payment for a definite time is a sufficient consideration for a contract of guaranty or suretyship. But if the credit was given before the contract of guaranty or suretyship was made, and such contract was no part of the inducement upon which the credit was given, the contract is without consideration and void, unless some new value or right be parted with by the creditor upon the strength of the guaranty.

Form of the Contract—Statute of Frauds.

§ 694. **Must be in writing.**—At common law contracts of guaranty or suretyship were valid without writing. But the fourth section of the English stat-

ute of frauds[1] provides, among other things, that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of any other person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized." This is the basis of similar legislation in nearly all the United States.

§ 695. **Debt, default, miscarriage.**—The words "debt, default or miscarriage of another" include another's torts as well as his breaches of contract, and include every case in which one person can become responsible for such acts or conduct of another as will support a civil action.

§ 696. **"Of another person."**—The meaning of these words has been a most fruitful source of discussion, and many of the cases on this point are in serious conflict. But though the other party be competent, still if there be no present or future liability on his part, what appears to be a guaranty, in form at least, need not be in writing. Thus, if two come to a shop, and one buys, and the other, to gain him credit says: "If he does not pay I will," this is a collateral undertaking and void without writing. But if he says, "Let him have the goods, and I will pay you," the undertaking is for the promisor's own debt, and it is immaterial that a third party received the goods, and no writing is necessary under this clause of the statute.

§ 697. **Promise to pay one's own debt.**—Where the performance of a promise to pay one's own debt will result, incidentally, in the discharge of the debt of another, no writing is required. This rule is commonly applied where one, in payment of his own debt, transfers a bill or note, orally undertaking as to its value or collectibility.

[1] *Ante*, Chap. VII.

§ 698. **Of the writing.**—What has been said elsewhere as to the sufficiency of the memorandum applies here.[1] Yet it might be useful to repeat that in many states the consideration must be expressed or the memorandum is without effect. But even where this is so, it is not necessary that it be formally or precisely described. The words "for value received" are sufficient. And where the guaranty was as follows, "I guarantee the payment of any goods which J. S. Stadt delivers to J. Nichols," it was held that it sufficiently appeared from the memorandum that the delivery of the goods by Stadt to Nichols was the consideration for the promise.[2]

§ 699. **Notice of acceptance or guaranty.**—Contracts of guaranty are often based upon a mere letter of credit with which the guarantor intrusts his principal, wherein he requests credit for the latter and agrees to be responsible to the creditor for the payment or collection of the debt. Unless this offer is acted on and a credit given to the principal, of course no contract arises. It may therefore be stated generally that where the guaranty is of a debt which is to be subsequently created, and the guarantor can not know beforehand that it will be created, or the extent thereof, reasonable notice of its acceptance must be given or the guarantor is not bound. Such is the law of most of the states, whether the letter be addressed generally or to a particular person.

Scope and Interpretation of the Contract.

§ 700. **Continuing guaranty.**—While a surety is said to be a favorite in the law, and his contract is not to be extended by interpretation beyond what its terms fairly import, a contract of guaranty or suretyship is to be construed like any other, with a view to discovering the true intention of the parties.

[1] *Ante*, § 91.

[2] *Ante*, § 92.

Whether a guaranty will be deemed continuing so as to cover a series of transactions, or whether it is held to be exhausted by a single credit, is a question often raised. No general rule for its determination can be laid down, and resort must be had to the language of the particular contract, interpreted in the light of circumstances and the special facts of the case. A guaranty, to pay for goods to be sold "from time to time," not to exceed a specified sum, is a continuing guaranty covering all purchases made until its revocation, or until the amount unpaid reached the limit of value, although the aggregate of purchases, including some that had been paid for, exceeded the limit of value; and so of an engagement to be responsible for such goods as M. may want hereafter, up to a specified sum.

But the following guaranties were held not to be continuing: "Please let my son have the lumber he asks for and it will be all right"; "if you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time."

§ 701. **When notice of principal's default necessary.**—Ordinarily a surety is bound to know every default of his principal, and is liable to be sued the moment such default occurs, without any previous notice thereof. But by the weight of authority a guarantor is entitled to reasonable notice of the debtor's default and will be released by the lack of it, provided he suffers injury thereby.

§ 702. **When creditors must sue the principal.**—Ordinarily, in the case of strict suretyship, the creditor is not bound to proceed against the principal debtor before suing the surety. The surety is liable the moment the principal is in default, for he can, by paying the debt, step at once into the shoes of the creditor as against the principal debtor and will be entitled, for his own indemnity, to whatever securities of the debtor the creditor has in his hands.[1]

[1] *Post*, § 707.

But it is the common law of some states, and the statute law of others, that if the surety, after the debt is due, requests the creditor to sue the principal, who is then solvent, and the creditor refuses or unreasonably neglects to do so, and the principal afterwards becomes insolvent, the surety is discharged. In some states the notice to the creditor to sue the principal must be in writing.

§ 703. **Guaranty of collection — Diligence required of creditor.**—A guaranty of collection means that the debt guarantied is collectible by due course of law, and the guarantor is not liable until prompt legal proceedings againt the principal have proved unproductive of the debt, unless, as many courts hold, a suit would be fruitless owing to the utter and hopeless insolvency of the principal. The same is true of a guaranty that a note is "good," or "good and collectible," or "collectible by due course of law." Even where the guaranty is: "I hereby guaranty the payment of the within note," some courts hold that the creditor must use due diligence before resorting to the guarantor.

If judgment against the principal is promptly obtained and an execution issued thereon is returned unsatisfied, this is prima facie evidence of diligence. But if the creditor has special knowledge of how he can collect, he must make use of it.

Where the guarantor expressly guaranties payment according to the terms of the principal contract, and not payment merely in general terms, he is absolutely bound upon default by the debtor, whether the latter be insolvent or not.

Rights of Surety After Payment.

§ 704. **Indemnity.**—A surety or guarantor who has fully paid his principal's debt, in whatever way, becomes at once entitled to recover indemnity of the principal, for in the absence of an express agreement for indemnity the law implies one.

§ 705. **Joint sureties—Contribution.** — If several persons occupy as to one another the relation of co-securities for the same debt, and one of them pays all, or more than his share, either voluntarily or under legal compulsion, the others are liable to him, ordinarily, for such contribution as will equalize the burdens. This right to contribution exists independent of any agreement for it.

All who become equally bound for the default of the principal at the same time and by the same instrument are co-sureties and liable for contribution. But they are co-sureties within the meaning of the rule, even though they become bound by different instruments and at different times, provided they are answerable as sureties for the same debt of the same principal.

§ 706. **Payment must be compulsory.**—In order to give a right to contribution against co-sureties, the surety claiming it must have paid under compulsion. This does not mean that he must have been sued, but only that the claim was one which he could not legally resist.

§ 707. **Surety who pays debt entitled to subrogation.**—Subrogation is the equity by which a person, who is secondarily liable for a debt and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution from others who are liable in the same rank with himself.

The surety who has paid his principal's debt is, in a sense at least, deemed an equitable assignee, both of the debt itself and the securities for it, which the creditor holds of the principal debtor.

The creditor who holds securities from the debtor is deemed to hold them as trustee for the benefit of the surety or guarantor. If, therefore, he willfully or negligently loses or impairs them, the surety will

be released to the extent that he is injured thereby. Thus, where the creditor, without the consent of the surety, voluntarily releases a mortgage or other lien which he holds upon the property of the principal as security for a debt or delivers up pledged property and thus extinguishes the pledge, or loses the security of a mortgage by negligent failure to record it, the surety is released *pro tanto*, and so if the creditor releases the levy of an execution or attachment on the debtor's property.

A surety or guarantor can not, as a rule, demand subrogation until he has paid the debt in full.

Discharge of Surety.

§ 708. **Payment by principal.**—Payment or performance by the principal, of course, discharges the surety or guarantor. So, if the guarantor or surety pays the debt he is discharged from liability to the creditor.

§ 709. **Release of principal.**—The release of the principal discharges the surety or guarantor unless, at the time of giving such release, it is agreed that the creditor shall retain his rights against the surety unimpaired. But if the surety is fully indemnified by property of the principal in his hands he is not discharged by the release of the principal without payment.

§ 710. **Extension of time to principal.**—A valid agreement between the principal and creditor, extending the time of payment or performance, entered into without the consent of the guarantor or surety, discharges the latter. But to effect such discharge the agreement extending the time must be valid, and hence must be upon sufficient consideration. The actual payment of interest in advance is a sufficient consideration for the creditor's agreement to extend the time. And from the payment of interest in advance, whether at the same or a higher rate than

the debt originally bore, an agreement is implied, prima facie, to extend the time for the period for which interest is thus paid.

§ 711. **Alteration of contract.**—Any other material alteration in the terms of the contract for which the guarantor or surety is bound will release him, unless he consents to the change. And where one is surety for a principal engaged in discharging the duties of a particular agency or office, he will be released by a material change in the duties of the principal, at least so far as concerns any loss growing out of such changed duties or responsibilities.

§ 712. **Release of co-surety.** — Where several are bound as sureties for the same debt and one of them is released, the others are relieved from liability to the extent that the one released would have been liable to contribute to them.

§ 713. **Concealment of principal's defaults.** — If one takes a bond with surety for the good conduct of an agent or other employe, knowing at the time that the latter is a defaulter and concealing the fact, the surety who signs in ignorance thereof is not bound, particularly if he signed at the direct request of the employer. And where there is a continuing guaranty of the honesty of a servant, if the master discovers that he has been guilty of dishonesty in the service, and continues to employ him without the knowledge and consent of the guarantor, he can not hold the guarantor for the subsequent dishonesty of the servant.

§ 714. **Negotiability of guaranty.** — An ordinary guaranty, not written upon a bill or note, is not negotiable. But some authorities hold that a guaranty, written on the back of a negotiable bill or note, is likewise negotiable. But even this is denied in many states; though a mere guaranty of an ordinary debt may be assigned, unless by its terms an assignment is clearly forbidden.

CHAPTER LII.

FIRE INSURANCE.

I. Nature and formation of contract.
   a. Definition.
   b. The parties.
   c. The form of the contract.
   d. Insurable interest.
   e. The premium.
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   g. Warranties, representations and concealment.

II. Special provisions of policy.
   a. Title and incumbrances.
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   d. Alteration and change of risk.
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III. Loss and its incidents
   a. Notice of loss.
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   c. False swearing.
   d. Waiver.
   e. Adjustment.

Formation of the Contract.

The theory of property insurance is simple. Each of a large number of persons insured contributes, by the payment of comparatively trifling sums called premiums, to a fund out of which any of their number who may suffer loss may obtain indemnity, the loss falling lightly on the many, instead of heavily on the few. Insurance does not avert loss; it merely distributes it, thereby encouraging enterprise by guaranteeing those who bring large masses of property together in business undertakings, against ruin by a single misfortune.

§ 715. **Definition.**—Fire insurance is a contract by one called the insurer or underwriter to indemnify another called the insured or assured, for loss or damage occasioned by fire during a specified period.

The agreed consideration is called the "premium." The written instrument evidencing the contract is called the "policy." The events and causes insured against are called "risks" or "perils." The interest of the insured in the property to which the contract relates is called the "subject-matter" and sometimes the "risk."

§ 716. **The parties.**—At common law any party competent to contract could enter into the contract of insurance on either side. This is still so in the absence of statute. In practice, however, the business of insuring both property and lives is in the hands of incorporated companies. Of the organization, powers and management of such corporations, lack of space forbids us to treat.

§ 717. **Form of the contract.**—The contract of fire insurance may, in the absence of statute or charter provision, be in any form, and may be oral as well as written. Owing to the looseness and ambiguity of many of the policies in use, but chiefly to the disposition of insurers to hedge themselves about with a multitude of conditions, exceptions, and limitations, rendering recovery practically impossible in the face of a contest, the legislatures of some states have made obligatory upon fire insurance companies the use of a prescribed form of policy.

§ 718. **The thing or interest insured.**—Where the insured has no interest in the thing insured, the policy is a mere wager, and void. Not only do policies without interest violate the rules against gaming, but they are contrary to the fundamental principle of property insurance, which is indemnity, and tempt men to the destruction of property in fraud of insurers and to the peril of surrounding property.

§ 719. **What constitutes an insurable interest.**—It is difficult to define accurately an insurable interest in property. It is, however, speaking generally, such a legal or equitable interest therein as gives the insured a direct pecuniary interest in its preservation. Of course, the absolute ownership of an unincumbered title is a sufficient interest to support a policy against fire. But it may be less than this. A mortgagor has an insurable interest in mortgaged property up to the value of the buildings thereon, so long as his right to redeem has not been cut off by foreclosure. A mortgagee has an insurable interest in the mortgaged property, and so has a holder of a mortgage as collateral security. So of a partner in partnership property; a mechanic's lienholder, a bailee, and others having a lien upon personal property, and, in general, executors, trustees, bailees and others who sustain such a relation to the property insured that they are, or may be, answerable over in case it is lost or destroyed.

One who has insured another has himself an insurable interest which will enable him to validly insure himself, in turn, against loss of the risk insured. His object in so doing is usually to get rid of an objectionable risk or to close out his business. The insurer of the prior insurer is called a re-insurer and his contract is one of re-insurance.

§ 720. **Alienation — Change of interest.**—Insurance against fire is a contract to indemnify the insured against loss or damage occurring to *his interest* in the property insured during a given period. If he parts with his entire interest before loss there is nothing for which he is to be indemnified, for, having nothing to lose, he has lost nothing. If he parts with only a portion of his interest, the insurance is valid as to the remainder, unless the policy, as is commonly the case, provides otherwise.[1]

[1] This is further discussed *post*, § 804.

§ 721. **The premium.**—The premium is the consideration upon which the insurer undertakes the risk. Ordinarily, in the absence of a special agreement to the contrary, the payment of the premium and the delivery of the policy are coincident. And if the policy contains a provision that it shall not be binding until the premium is paid there can be no recovery unless it is paid, or the provision is waived by the insurers.

§ 722. **The peril insured against.**—Ordinarily the policy insures against loss or damage by fire. But damage caused by heat due to the actual burning of neighboring property is a loss by fire. Loss by an explosion alone, unless such explosion was caused by fire, is not a loss by fire; otherwise where the explosion was caused by fire.

Damage done by the means employed to put out fire is a loss by fire, including damage done by water. A loss by lightning, where there is no ignition, is not a loss by fire, and the insured can not recover unless the policy also insured against loss by lightning.

§ 723. **Warranty.**—A warranty in the law of insurance is a stipulation or statement inserted or referred to in, and made a part of, an insurance policy, upon the truth or performance of which the validity of the contract depends.

§ 724. **Distinguished from representation.**—A representation differs from a warranty in several respects. A representation is not a part of the policy, but merely a statement leading up to it and tending to induce the insurer more readily to accept the risk. In order to avoid the policy it must be: (1) False; (2) Material.

If a statement or undertaking be a warranty, however, the right of the insured to recover depends upon its strict and literal, or at least substantial, truth or performance. The materiality of every warranty is settled in advance, and it can not be shown

by the insured that it was immaterial or wholly disconnected from the cause of the loss.

§ 725. **What constitutes a warranty.**—It is impossible to formulate any general rule whereby to determine whether a statement of the insured is a warranty or not. It must be contained in the policy, however, or referred to in it, and made a part thereof. Statements contained in a separate instrument may be made warranties by reference, provided the intention to make them such is clearly expressed. Commonly, statements contained in the application are regarded as warranties, where they are referred to in and declared to be such by the terms of the policy itself. Unless so referred to and made a part of the policy, however, they are not warranties, but representations at most, and the policy will be affected by their falsity only when they are material to the risk.

§ 726. **Representations.**—A representation is a statement incidental to the contract, touching some fact relative thereto, and upon the faith of which the contract is or may have been entered into. If false, it is called a misrepresentation, and a misrepresentation, if material, avoids the contract, whether the insured knew it to be false at the time he made it or not. If immaterial, the policy is unaffected.

§ 727. **Materiality.**—A representation is material when it is of such a nature that it would probably induce an insurer of ordinary prudence to take the risk, or to take it at a lower rate of premium than he otherwise would. From this it follows that statements relating to the construction, location, uses, character and value of the risk and to title and incumbrances are usually, if not always, material. So, too, of the answers of the applicant to direct and specific questions. Representations need not be strictly and literally true. If they are substantially true the policy is valid.

§ 728. **Concealment.**—The insurer has a right, in deciding whether or not to accept the risk at all and upon what terms, to know the whole truth, and a willful withholding or suppression of a material fact by the insured is ordinarily tantamount to a false representation, both in its moral nature and legal effect. Such suppressing or withholding is termed *concealment.*

§ 729. **What must be disclosed.**—In marine insurance every fact known to the insured, or which he may reasonably be presumed to know, and which he knows or ought to know to be material to the risk, must be disclosed, and a failure to disclose them, whether by design or not, will avoid the policy. Whether the same strict rule applies to fire and life insurance does not seem clear and it seems to be law that a failure to communicate a material matter about which no inquiry has been made will not avoid the policy in the absence of a fraudulent intent, unless, perhaps, the facts in question are unusual and at the same time material, and such as the insured knew, or ought in reason to have known, to be such, and the insurer neither knew or had reasonable means of knowing them, or could not reasonably be expected to anticipate them as grounds for specific inquiries.

But facts that diminish the risk, or already covered by a warranty, or of which the insured knows or may reasonably be supposed to know, need not be disclosed.

CHAPTER LIII.

SPECIAL PROVISIONS OF THE POLICY.

§ 730. **In general.**—The modern contract of fire insurance, where legislation has not interfered, bristles with various conditions and stipulations, many of which should be retained, while others operate to give the insurer an undue advantage over the insured, and should, perhaps, be prohibited by law. They may or may not amount to warranties or representations, and may be waived or not waived.

They may be divided into two general classes:

(1) Those relating to matters prior to the loss and inserted for the purpose of defining and determining the limits of the risk.

(2) Those which relate to matters occurring or steps to be taken after the loss, for the purpose of establishing and adjusting it and recovering therefor.

§ 731. **Of title and incumbrances.**—The insured is not bound, as a general rule, to disclose the precise nature of his title unless requested. But all inquiries as to title and incumbrances must be accurately answered. Ordinarily the statements of the insured, as to title and incumbrances, are made a part of the policy and are warranties, and their falsity will avoid it. The common provision is that, "if the interest of the insured be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the insured," or "be not absolute," or "be incumbered," it must be so represented to the company and expressed in the policy, otherwise the policy shall be void.

§ 732. **The property.**—The property must be de-

scribed with sufficient accuracy to identify it. Yet it is sufficient that the property be identified with reasonable accuracy, though if the description amount to a warranty, less than a wholly wrong description may invalidate the contract. So, a misdescription will, if it materially affects the risk, amount to a misrepresentation, and will avoid the policy on that ground.

§ 733. **Alienation—Change of title.**—If the property insured is sold, the rights of the insured against the company do not pass to the purchaser, and the policy ceases to be a protection either to the vendor or the vendee. If only a part and not all of the interest of the insured is aliened, any interest that he retains is protected unless there be a clause in the policy, and there often is, forbidding any alienation or change of interest, whether by voluntary transfer or by legal process or judicial decree, without the consent of the insurer.

§ 734. **Assignment of the policy.**—A policy against fire is not assignable without the consent of the company, even where it contains no clause forbidding assignment. If the insured conveys the property and assigns the policy *with* the consent of the company, a new contract arises between the insurer and the assignee, which can not, as a general rule, be defeated by any acts of the assignor prior to the assignment. Where the policy provides for *written consent to assignment* a mere oral promise by the agent to give such assent is of no effect.

§ 735. **Alteration—Change of risk.**—Fire policies commonly prohibit any alteration or change in the use or occupation of the premises so as to increase the risk, without notice to and consent of the company. Whether there has been such a change, and if so whether it was material, is usually for the jury to decide. If there has been a material change, the policy, by virtue of this clause, is void, though the fire was due to some other cause. If the policy, as is often

the case, contains a classified list of hazards, and the risk in question belongs to a less hazardous class when the policy was issued, or expressly prohibits the use to which the property was put, without reference to increase of risk, the policy is void without regard to the question of materiality or the origin of the fire. In the absence of such provisions a use and occupation increasing the risk bars recovery only where it caused the loss.

§ 736. **Other insurance.**—It is now generally provided that the policy shall become void, if the insured shall, without the consent of the insurer indorsed on the policy, procure other insurance upon the subject-matter. Such a provision is valid.

§ 737. **Vacancy.**—The common stipulation that if the premises become vacant or unoccupied without the consent of the company indorsed on the policy, it shall be void. Vacancy means substantial vacancy and disuse of the premises.

§ 738. **Builder's risk.**—A common clause is known as "Builder's Risk," and usually reads as follows: "The working of carpenters, roofers, tinsmiths, gasfitters, plumbers or other mechanics, in building, altering or repairing the premises named in this policy will violate the same, unless permission for such work be indorsed hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or indorsement." This clause has its stipulated effect.

§ 739. **Use and occupation.**—The modern fire policy contains various provisions as to the use and occupation of the premises, and the storage of paints, oils, gasoline, gunpowder, and other inflammable or explosive substances. The questions presented under these clauses and the clauses against increase of risk are many and interesting. Many of them turn upon the conflict between the written and printed clauses of the policy, and if the written portions expressly describe the property insured as of a certain kind, the

policy will not be avoided by a printed clause expressly prohibiting the keeping of goods of that kind. And it is generally held that the use of such materials as are ordinarily or necessarily used in the business, the stock and materials of which are expressly covered by the policy, will not avoid it, though by the printed clauses the keeping or use of such materials is prohibited.

§ 740. **Location of property—Removal.**—If personal property is described as contained in a particular house or building, the description of locality is usually construed as a continuing warranty, and the property is not covered when moved to some other locality. But an exception is usually recognized in the case of horses, vehicles, and the like, the use, preservation or health of which requires a temporary absence from the place mentioned in the description.

CHAPTER LIV.

THE LOSS AND PROCEEDINGS AFTER LOSS.

§ 741. **Notice and proofs of loss.**—Numerous requirements are always found in fire policies touching notice of the loss and the proofs thereof. Their object is to protect the insurers from fraud and imposition and to aid in the detection of these wrongs by giving them an opportunity promptly to investigate the circumstances surrounding the loss. Noncompliance with them absolutely defeats the policy at the election of the insurer.

§ 742. **Notice and proofs of loss.**—The time for giving notice and submitting proofs of loss is often fixed by the policy at a certain number of days or months after loss occurs. Unless waived, the notice and proofs must be given and made within the time fixed, or no recovery can be had. If notice is simply required to be given to the company, notice to an agent is sufficient; if notice is required to be given to a specified officer of the company, compliance must be shown. The fact that the company knows of the loss does not excuse the stipulated notice. If written notice is stipulated for, verbal notice is insufficient, unless the defect is waived.

§ 743. **Proofs of loss—False swearing.**—In addition to notice of loss, fire policies usually require a sworn statement by the insured, setting forth, ordinarily, the interest of the insured, the nature and value of the property destroyed, the cause of the fire, if known, and, frequently, a full and particular statement or account of the property injured or destroyed, together with the cash value of each item, and a list or description of other policies, if any, on

the same property. Compliance with these provisions is a condition precedent to recovery whenever compliance is possible, unless there has been a waiver by the company.

Most policies contain a provision that any fraud or false swearing, touching the property lost or its value, shall render them void. This is given its stipulated effect. But a mere innocent misstatement or overestimate will not prevent a recovery.

§ 744. **Waiver and estoppel.**—Insurers may, and often do, by words or conduct, place themselves in such a position that they can not take advantage of a breach of warranty, misrepresentation or concealment, or avail themselves of a breach of some other condition of the policy. In such cases they are said to have waived the cause of invalidity, or to be estopped to assert it.

If the insurer, having full knowledge of facts upon which a defense may be based, nevertheless delivers the policy, he can not afterward set up such facts as a ground of avoidance. To permit him to do so would be to sanction a fraud. Thus, issuing a policy with knowledge of misrepresentations, or a breach of warranty, has been held a waiver of defenses based upon these grounds.

If the insurer, with full knowledge of facts arising since the issue of a policy, treats it as valid, as, by the receipt of premiums, or by consent to its assignment, he can not afterward assert such facts to avoid the payment of a loss.

§ 745. **Conduct after loss—Waiver of notice and proofs of loss.**—If the insurer, immediately after loss, denies all liability, this is a waiver of notice and proofs of loss, and any defect in the notice or proofs, is waived where the insurer bases his refusal to pay on other grounds. Failure to notify the insured promptly and specifically of defects in his proofs of loss is a waiver of such defects. A general objection is insufficient; specific defects should be pointed out

in time to enable the insured to correct them, and an objection on account of specific defects is a waiver of all other defects.

§ 746. **The loss and its adjustment.**—Fire insurance is a contract of indemnity for the immediate, not the remote, consequences of the peril insured against, provided such loss does not exceed the amount specified in the policy. Adjustment, then, is the ascertaining of the amount of indemnity to which the insured is entitled.

§ 747. **Same—Valued and open policies.**—A policy is either valued or open. A valued policy is one in which both the property insured and the amount payable in case of loss are fixed, and which binds the insurer to pay the whole sum insured in case of *total* loss. Thus, a policy for $3,000 on the brick store, etc., *valued at* $3,500, is a valued policy. In the absence of fraud, the valuation fixed in the policy is conclusive on the insurer, and he can not show in case of total loss that the property was in fact worth less than the amount stipulated unless the overvaluation was fraudulent.

§ 748. **Open policies.**—An open policy is one where the value of the property insured is not fixed in advance by the policy, but is left to be ascertained after loss. The policy is not valued because the amount up to but not beyond which the insured is to be liable is stated in the policy. Such amount is always stated. Whether a policy is to be regarded as open or valued depends upon the intention of the parties. The words "valued at," following the description of the property, are usually conclusive in rendering the policy a valued one.

§ 749. **Indemnity — How measured.**—Except where the policy is valued the insured is only entitled to his actual loss, provided that does not exceed the amount specified in the policy. Loss of expected profits due to the interruption of business by the fire can not be recovered unless such profits are expressly

insured. The fair cash value of the property at the time of loss is the ordinary measure of recovery. If the goods have been injured, but not destroyed, then the difference between their value in the sound and damaged state may be recovered.

§ 750. **Double insurance.**—Commonly there are several policies upon the same risk, provided it is very valuable, in which case they will contain one of two provisions: (1) That the insurer shall be liable only so far as the risk is not covered by other and prior insurance, in which case the second or subsequent insurer is liable only for what is not covered by prior policies, and then only up to the amount fixed by the contract; or, (2) that if there be other insurance upon the same interest or risk, the insurer shall be liable only for that proportion of the loss that his policy bears to the whole amount of insurance in force at the time of loss. This last is the most common provision.

§ 751. **Arbitration.**—Most fire policies provide that in case the insurer and insured can not agree as to the amount of loss that the matter shall be submitted to arbitration in the manner specified therein. Such stipulations are so framed that arbitration, or an offer to arbitrate by the insured, is a condition precedent to his right to sue and recover for the loss, unless the loss is total or the company denies all liability under the policy.

CHAPTER LV.

LIFE INSURANCE—OTHER FORMS OF INSURANCE.

I. Nature and formation.
- a. Distinguished from property insurance.
- b. Insurable interest.
- c. Representations, warranty and concealment.
- d. Premium.

II. Incidents.
- a. The suicide clause.
- b. Residence and travel.
- c. Assignment and change of beneficiaries.
- d. Notice and proofs of death.
- e. Amount of recovery.

Other Forms of Insurance.

III. Other forms of insurance.
- a. Marine.
- b. Accident.
- c. Credit.
- d. Employers' liability.
- e. Fidelity.
- f. Title.
- g. Casualty.

§ 752. **In general.**—By the simplest form of life policy, the insurer, for an annual premium, agrees to pay a certain sum of money to the representatives of the estate of the insured, or to his widow or children, or to some other designated person, upon the death of the party whose life is the subject of the risk. But the contract may embody other features. Thus, in so-called endowment insurance, the insurer not only agrees to pay a specified sum in case of death happening as above, but agrees to pay to the insured or some other designated person a specified sum when the insured reaches a certain age, or a specified annuity thereafter.

§ 753. **Nature and definition of the contract.**—Insurance upon property is strictly a contract of in-

demnity. Life insurance, however, is said not to be a contract of indemnity at all, but a contract by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a specified life, or at the end of a certain period, provided death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs, or the period of insurance is ended.

The law of life insurance, however, has been developed in analogy to that of marine and fire insurance, and the terminology of the several forms of insurance is largely the same. The term "beneficiary" in life insurance usually means the person, other than the one whose life is insured, to whom the policy is payable.

§ 754. **Insurable interest.**—At common law no insurable interest was necessary to support a life policy, but now, by statutes or decisions, an insurable interest is almost universally required. But the requirement is subject, by the weight of authority, to two important exceptions:

(1) Though there must be an insurable interest at the inception of the policy, such interest need not continue or exist at the time of death. It is sufficient that it exists when the policy is taken out.

(2) As one may insure his own life and make the proceeds payable to himself, the insured, contracting directly with the insurer, and paying the premiums himself, may designate as beneficiary one who is wholly without an insurable interest in his life.

An insurable interest in life is difficult to define. In general, it means that the party effecting the insurance sustains such relations to the insured by reason of the ties of blood, marriage or contract, that the former would be reasonably likely to sustain some substantial damage by the death of the latter.

§ 755. **Same—Relationship.**—A husband has an insurable interest in the life of his wife, and the wife in the life of her husband. A father has such

an interest in the lives of his minor children, on the ground that he is entitled to their services. A sister has an insurable interest in the life of a brother who furnishes her support.

§ 756. **Same—Contractual relations.** — A partner has an insurable interest in the life of his copartner, a master in the life of his servant, and a servant in that of his master. A party who has a right by contract to receive support from another during life has an insurable interest in the life of the party from whom such support is due. A creditor has an insurable interest in the life of his debtor. But the amount of the insurance must not be grossly excessive so as to be a mere cover for a wager.

§ 757. **Representations and warranties.** — The contract of life insurance is almost universally based upon a written application, wherein the party seeking the insurance states various facts relative to the age, sex, health, occupation, and habits of the insured, in response to questions propounded by the insurer.

These statements may be, and usually are, expressly agreed to be warranties and a part of the policy. In any case, the answers may amount to representations, and must then be substantially true, so far as material, under principles laid down under the title fire insurance.

If a statement is a warranty it must be strictly true to the ordinary meaning and purpose of the parties in making and requiring it. The most common warranty is that the insured is in good health. These words mean what they usually and commonly mean, *i. e.*, that the party enjoys what is commonly regarded as good health, that he is free from any conscious derangement of organic functions.

§ 758. **Concealment.**—Even though the insured does not warrant that he has disclosed all matters materially affecting the risk, if he intentionally with-

holds from the insurers any fact which he knows, or ought to know to be material, the policy is avoided.

§ 759. **The premiums.**—The premium in life insurance usually consists of a certain annual sum. Unless its payment is, by the express terms of the policy, a condition precedent to the risk, the policy is valid without its being paid in advance. In practice, however, it is usually expressly agreed that the payment of the first premium shall be a condition precedent to the formation of the contract, and that failure to pay any annual premium when it falls due shall render the policy void. But the insurer may waive the prompt payment of the first or any subsequent premium, and he will be commonly held to have done so where he voluntarily receives the overdue premium, or takes a note therefor due at a future day.

§ 760. **Usual clauses and conditions—Suicide.**—It is a universal condition of life policies that the insured shall not enter into any naval or military service without the consent of the insurer. So it is always stipulated that the insured shall not, without the consent of the insurer, reside or travel beyond certain specified limit of territory. Violations of these conditions avoids the policy unless they are waived by the company in some way, as by receiving premiums with a knowledge of the breach.

Death in known violation of law, by the terms of most policies, prevents a recovery. Many policies provide that if the insured shall "die by his own hand," or "by his own act," or " shall commit suicide," the policy shall be void. This clause does not apply to cases where the insured dies from poison taken by mistake, or the accidental discharge of a gun. The great question is whether, by the insanity of the insured, this clause is rendered inoperative. Some courts hold that it is, while others hold that it is not, provided the insured knew and intended that death

should result from his act, and there is much discord in the decisions of the various courts. But where the clause is that "the policy shall be void if the insured shall commit suicide, *sane or insane*," it will be vitiated by any intentional act of self-destruction, and merely requires consciousness of the physical consequences of the act and not its moral nature.

§ 761. **Assignment and change of beneficiaries.**—Unless assignment is forbidden by statute, or by the charter of the company, or by the terms of the policy itself, the insured, if himself the beneficiary and owner of the policy, may assign it without the consent of the company. Where a policy is assigned as collateral security by way of pledge, however, the assignee, although entitled to recover the face of the policy, can retain only enough for his indemnity, and must account to the debtor or his representatives for the balance.

Where the insured and the beneficiary are different persons it is generally held that the former can not assign the policy or substitute another beneficiary without the consent of the original beneficiary. But by the weight of authority the insured, who is also the beneficiary, may assign the policy to, or name as beneficiary, any person he chooses, whether the latter has an insurable interest or not. But this matter is frequently regulated by statute or by charter provisions, particularly in the cases of so-called "beneficial associations."

§ 762. **Notice and proofs of death.**—It is usual for life policies to require formal notice and proofs of death. Similar principles to those applicable to fire policies govern here.

§ 763. **Amount of recovery.**—A life policy in the ordinary form is always a valued one in the sense that the insured or beneficiary is entitled to recover the full amount of the policy, except under special circumstances. Sometimes it is provided that the insured may, in case of forfeiture by non-payment of

premiums, recover some specified amount, which is usually the premiums paid. So it may be provided that if death occurs within some specified time, as three or six months, only a limited amount shall be payable, but that after such time the whole face of the policy shall be payable in case of death.

Other Forms of Insurance.

§ 764. **Accident insurance.**—Accident insurance, though quite recent in its origin, is governed by principles derived from other forms of insurance. It is simply insurance against injury or loss of life by reason of accident. So far as it indemnifies against loss of time, earnings, and medical expenses, it resembles property insurance, but so far as it provides for the payment of a certain sum in the event of death, it resembles life insurance proper.

Ordinarily accident policies provide for a fixed weekly indemnity in case of accidental injury, for a certain number of weeks (usually twenty-six) and the payment of a fixed sum in case of death within ninety days after the accident, and also a fixed sum for certain permanent injuries, as loss of sight, or of one or both hands or feet, etc.

§ 765. **Marine insurance.**—Marine insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a specified sum, to indemnify another, called the insured, against loss arising from certain perils or sea risks to which his ship, freight, merchandise or other interest may be exposed during a certain voyage or a certain period of time.

§ 766. **Credit insurance.**—Credit insurance is a contract to indemnify the insured against loss by the failure of customers to pay for goods sold them. Technically it is not a contract of suretyship but a policy of insurance and is governed by similar principles.

§ 767. **Employers' liability insurance.**—By this form of insurance the insurer agrees to indemnify the insured against losses occasioned by his liability to employes injured in his service.

§ 768. **Fidelity insurance.**—Fidelity insurance is a contract to indemnify the insured against loss by the dishonesty or default of employes. Bonds given by fidelity insurance companies are analogous to policies of insurance, though partaking also of the nature of guaranties or suretyships.

§ 769. **Title insurance.**—Title insurance is a contract to indemnify the owner or mortgagee of real property against loss by reason of defective titles, liens or other incumbrances.

§ 770. **Casualty insurance.**—This is a contract whereby the insured is indemnified against loss to property by reason of accident. It is distinguished from accident insurance by the fact that property and not the person is the subject of risk. Among the perils insured against are injuries to live stock, breakage of plate glass, bursting of boilers and loss by tornadoes. Fire is usually excepted by these policies.

REAL PROPERTY.

General Nature and Classification.
Estates.
Conveyances.
Mortgages.
Landlord and Tenant.

I. In general.
- a. Corporeal....
  - 1. Land.
  - 2. Crops, trees, herbage.
  - 3. Fixtures.
- b. Incorporeal.

II. Estates....
- a. In fee.
- b. For life in general.....
  - 1. Waste.
  - 2. Emblements.
- c. For life in particular..
  - 1. Dower.
  - 2. Homestead.
- d. For years. (See Landlord and Tenant.)
- e. Joint in common.
- f. Equitable.

Contracts to Convey and Conveyances.

III. The contract to convey.
- a. Statute of frauds.
- b. The title.

IV. The conveyance.
- a. The form....
  - 1. Warranty deed.
  - 2. Quitclaim deed.
- b. The date.
- c. Operative words.
- d. Words of inheritance.
- e. Description.
- f. Exceptions.
- g. Covenants.
- h. Execution...
  - 1. Signing.
  - 2. Sealing.
  - 3. Attestation.
  - 4. Acknowledgment.
  - 5. Recording.

MORTGAGES OF REAL PROPERTY.

- I. Nature of.....
  - a. At law.
  - b. In equity.
  - c. Modern view.
- II. Requisites.....
  - a. Form.
  - b. Execution.
  - c. The debt secured.
- III. Incidents.....
  - a. Assignment.
  - b. Registry and priority.
- IV. Extinguishment and discharge.
  - a. By payment.
  - b. By tender.
  - c. Satisfaction of record.
- V. Rights and remedies upon default.
  - a. Suit to redeem.
  - b. Foreclosure.
  - c. Sales under powers.

LANDLORD AND TENANT.

- I. The contract of letting.
  - a. The form.
  - b. The term.
  - c. Words of letting.
  - d. Description of premises.
  - e. Rent.
  - f. Conditions of forfeiture and re-entry.
- II. Incidents.....
  - a. Lessor's covenants.
  - b. Lessee's covenants.
  - c. Assignment and subletting.
- III. Termination of lease.
  - a. By lapse of time.
  - b. By forfeiture.
  - c. By eviction.
  - d. By notice.
    - 1. Under tenancy at will.
    - 2. Under lease from year to year.

CHAPTER LVI.

REAL PROPERTY.

General Nature and Classification.

The impossibility of conveying any adequate knowledge of so vast and important a topic within available limits of space, has compelled a choice between absolute silence and a brief and imperfect glance at some of the salient features of American real estate law. What is said, therefore, is with a view to round out the general knowledge of the student concerning property, and to show in some degree the necessity for caution and proper legal advice in matters of land title and conveyancing.

§ 771. **Definition.**—The phrase, real property or things real, comprehends, in general, land and whatever is permanently affixed to land, either by nature or the hand of man, and also certain rights annexed to lands or issuing therefrom. Real property may be corporeal or incorporeal.

§ 772 **Corporeal real property—Land.**—In its legal sense "land" comprehends the ground or soil of the earth, together with its produce or increment before severance, and is deemed to extend indefinitely upward and downward. It includes all buildings, fences and other structures upon the land, and all minerals, fossils, oils and gases beneath the surface. A grant of land, therefore, without exception or reservation, will pass all these things.

While water is not susceptible of the same possession and permanent enjoyment as land, there may

be a property or use therein which will be as rigidly protected as the ownership of the soil itself. In the case of running water, the owner through whose land it flows has a right to enjoy its uninterrupted flow from the lands of the proprietor from over whose estate it comes, and may use and enjoy it so long as he returns it in its natural course to the owner below him, without materially diminishing its quantity or corrupting its purity. Neither may an owner dam up the water so as to overflow the lands of those above him, unless he has acquired the right by grant or prescription or under an act of the legislature.

§ 773. **Crops, trees, herbage, etc.**—As between the vendor and purchaser of land, growing crops not yet matured are a part of the land and pass by a grant of it unless expressly reserved. But a fully ripened crop has been held personalty, though not severed from the soil; and for purposes of sale or mortgage separate from the land, growing crops are regarded as chattels.[1]

§ 774. **Fixtures.**—As between vendor and purchaser, mortgagor and mortgagee, and heir and executor, nearly every article which is annexed to the land and is adapted to its more convenient use and enjoyment, becomes a part thereof and is not subject to removal but passes with the land. Such is usually the case with storm doors and windows, machinery pertaining to a manufacturing building, gas and water pipes, and hot air furnaces. These things, once personal in their nature, that have become realty by annexation to the soil, are called fixtures.

For the encouragement of trade and agriculture, certain exceptions have been made in favor of tenants, and a tenant, before the expiration of his term or within a reasonable time thereafter, if his tenancy is of uncertain duration, may remove whatever he may have annexed to the land for the purpose of agriculture, trade, or domestic use or convenience, pro-

[1] *Ante*, § 94.

vided he can do so without material injury to the premises. Thus the tenant may remove counters and shelving, though fixed to the walls or floors by nails or screws, and so of kettles and pipes in a distillery, vats and coppers of a soap boiler, stoves and gas fixtures, and even temporary buildings erected for purposes of trade or manufacture. The term fixtures, therefore, is also used to describe things which, in spite of their annexation to the freehold, may, as between landlord and tenant, be severed and removed, provided no permanent injury is thereby done to the premises. But the tenant, for a term certain, must remove his fixtures before his term expires, otherwise they become the property of the landlord. If the tenancy is of uncertain duration, or is put an end to without the fault of the tenant, he has a reasonable time to remove his fixtures.

§ 775. **Incorporeal real property.** — Incorporeal real property in the United States usually consists of what are called easements, and an easement is the right to some profit or beneficial use which one proprietor has in or over the estate of another. The most important kinds of easement are ways and party walls.

A way is the right of a person other than the owner to pass and repass over the land of another, reserving to the owner of the soil all the rights and advantages consistent with such passage.

Ways are either public, as in the case of streets and roads, or private, as where one man is entitled to go across the land of another to reach a public highway. Private ways may be created by deed or else by prescription, which is such a long use that a grant is presumed.

A party wall is a wall common to two adjoining buildings, which by agreement or long user has become subject to mutual easements for support on the part of the adjoining owners.

CHAPTER LVII.

ESTATES IN REAL PROPERTY.

§ 776. **In general.**—Under the feudal system as it existed in England, all land was deemed to be held mediately or immediately of the crown. All landholders were tenants and their holdings were called estates or tenancies. While in this country the feudal system has ceased to exist, even if it ever had much foothold, we still cling to the feudal classification of estates, and still retain many rules and theories respecting them that had rise in the ancient feudal policy. Without any serious attempt at classification, we will now proceed to notice some of the more important estates in land.

§ 777. **Fee-simple.**—An estate in fee-simple is the highest estate known to the law, and is defined as an estate of inheritance, free from condition and of indefinite duration. In this country, for all practical purposes, the owner of an estate in fee-simple is an absolute proprietor. He may dispose of it by deed during his lifetime, or by will to take effect at his death. In the absence of a will, the title thereto is cast, at death, upon such persons as have been appointed by law to succeed to the estate, called heirs.

The owner of the fee may carve out of it certain less estates, as for example where he grants to another an estate for life or for years.

§ 778. **Estates for life.**—An estate for life is one that is vested in a person called the life tenant, its duration being limited by his own life, or the life of another, or the joint lives of the tenant and another or others. The life tenant must pay the taxes and

the interest upon incumbrances. He is not bound to pay the principal. Neither is he bound to make improvements, and if he does so they are at his own cost. He is bound to make such repairs as are necessary to prevent the premises from falling into decay, but not to rebuild structures destroyed without his fault.

§ 779. **Same—Waste.**—The life tenant is prohibited from doing anything which falls within the legal definition of waste. Waste may be defined as any act done or permitted by the tenant for life, or for years, which results in permanent or lasting injury to the inheritance, or to the prejudice of any person having an interest therein.

What constitutes waste depends upon a variety of circumstances. Thus, while the tenant for life or years may ordinarily take sufficient timber for fuel and necessary repairs, unless restrained by the lease or conveyance under which he holds, this rule would have no application to city property. So, while the tenant may not, as a rule, cut and sell the timber, he may do so if it would be consistent with good husbandry.

§ 780. **Same—Emblements.**—By emblements is meant the right of the tenant to enter and cultivate, and harvest and carry away, after his tenancy is ended, such *annual* products of the land as he planted before his tenancy expired. This right belongs only to a tenant whose term is of uncertain duration and whose tenancy is terminated without his fault. A tenant for life or his personal representatives is therefore entitled to emblements, and so of a tenant at will whose tenancy is terminated by the act of the landlord. But it is otherwise of a tenant for years in the absence of contract or local usage.

§ 781. **Estates arising out of marriage.**—By the common law the husband was entitled to the rents and profits of the wife's lands during coverture. He

was therefore a tenant for life. If the wife died first his estate was terminated, and the property went at once to her heirs, unless there was issue born alive. In that case the husband's estate was continued during his life and was known as curtesy. This estate still exists in many of our states, although in some, it vests only where the wife has not disposed of the land by deed or will. The estate of the husband in the wife's lands during marriage has been abolished in most of the states and modified in others.

§ 782. **Same—Dower.**—By far the most important of the conjugal estates at the present day is dower. This is the interest or estate provided for the widow by law out of the husband's real estate.

At common law, and generally in the United States, the widow has, during her life, one third of the lands of which the husband was seized during marriage.

In the majority of states the wife can be barred of her dower only by her voluntary release, which she usually effects by joining with her husband in his conveyance of the land in the manner prescribed by the law of the state where it lies.[1]

§ 783. **Same—Homestead.**—By the statutes of the several states, the family residence and a certain quantity of land adjoining it, is usually exempt from forced sale for debt, and can not be disposed of by the husband without the consent of the wife.[2]

The extent of the exemption is various. Often it extends not only to the land, but to its proceeds in case of sale, at least for some limited time thereafter. Usually the homestead is exempt from all debts, except purchase-money, liens and mortgages and mechanics' liens.

§ 784. **Estates for years.**—Estates for years are usually discussed under the title, "Landlord and Tenant," and are treated of under that head later on.[3]

[1] *Post*, § 805.
[2] *Post*, § 805.
[3] *Post*, Chap. LX.

§ 785. **Joint estates.** — A joint tenancy exists where an estate is held by two or more persons jointly, so that during the lives of all they are equally entitled to enjoy the land, but on the death of one his share vests in the survivor or survivors, until there is a single survivor, who then owns the whole estate in severalty. In several states these tenancies are abolished, except in the case of trustees, and elsewhere all joint estates are held to be tenancies in common, unless they are expressly made joint tenancies by the terms of the instrument creating them. In tenancy in common the several tenants or owners hold by several and distinct titles. Each may dispose of his own individual share by deed or will, and upon the death of any tenant intestate, his share descends to his heirs.

§ 786. **Equitable estates.**—The common law recognizes but one owner of land, and he is the holder of the strict legal title. Various circumstances in England led, at an early day, to the invention of *uses*, by means of which one person might convey lands to another upon an understanding that the latter should hold them for the benefit of the former or some third person. The party entitled to the benefits and enjoyment of the estate, the legal title to which was in another, was said to have the *use*. The trust in modern real estate law is substantially like the ancient use, and arises where one person is clothed with the legal ownership of property, which he is bound in equity to hold, or dispose of for the benefit of another. The party holding the legal title is called the trustee, and the party for whose benefit the trust is created is the beneficiary.

The whole subject of express trusts is now largely regulated by statutes.

CHAPTER LVIII.

SALE AND CONVEYANCE OF LAND.

The Contract to Convey.

§ 787. **Contracts for the sale of Land — Vendor and purchaser.** — Every voluntary deed of conveyance of land is but the carrying out of some agreement, understanding or contract previously had or entered into between the parties. The object of an executory contract for the purchase and sale of land is to bind the vendor to convey to the vendee the estate and title bargained for, and to bind the vendee to take and pay for the estate conveyed.

§ 788. **The contract.**—By the fourth section of the English statute of frauds, as we have seen, no action could be brought upon any contract for the sale of any land, tenements, or hereditaments, or any interest in or concerning them, unless the contract or some note or memorandum thereof was made in writing and signed by the party to be charged. This provision has been substantially re-enacted in nearly all of the states. Its scope and effect have been elsewhere discussed and will not be re-examined here.[1]

The rule of *caveat emptor* applies to sales of real property. In the absence of fraud or of covenants for title, not even a remedy against his grantor personally may be open to one whose title proves defective. The only safe course for a purchaser of land is to satisfy himself that the title is good in his vendor, not by his own unskilled researches or by

[1] *Ante*, § 94.

those of the county register of deeds, but by the aid of a competent legal adviser.[1]

The Deed or Conveyance.

§ 789. **Must be in writing.**—Before the statute of frauds an estate in corporeal real property could be conveyed without writing. But since that statute was enacted in England, and under the statutes of our states, a written, sealed instrument of grant is now required for the creation and transfer of all estates or interests in lands, legal or equitable, except leases for certain short terms, which may be created orally or by informal writing.[2] These provisions, of course, do not apply to such estate or interests as arise by act or operation of law, as dower and curtesy.

§ 790. **Definition and requisites.**—In its widest sense a deed is any writing sealed and delivered between the parties. It therefore includes instruments containing promises only as well as grants. In its narrower sense, however, the term deed signifies a writing, sealed and delivered between the parties, by which the title to lands is made over from one to the other, in which case the phrase, "deed of conveyance," aptly describes the instrument.

A deed should be written or printed with ink, though a pencil writing is probably good.

§ 791. **Of the different kinds of deeds.**—Two forms of deeds are commonly used in this country; the quitclaim deed and the warranty deed.

The quitclaim deed purports to pass whatever title the grantor has and no more. This is its legal effect except in a few states where the grantee will get the

[1] See suggestions for the study of law, by Judge Cooley, in his edition of Blackstone's Commentaries, where the dangers of unskilled examination of land titles are clearly illustrated.

[2] *Post*, § 825.

rights of a bona fide purchaser for value if he is actually such.

Ordinarily the grantee in a quitclaim deed has no remedy against the grantor in case of failure of the title, unless the grantor was guilty of fraud; and the latter may even buy in afterward and hold a title adverse to that of his grantee. As to such title or interest as the grantor has at the time of the conveyance, however, the quitclaim deed is as good and effectual as any other form of conveyance.

A warranty deed is most commonly used in this country, and may be defined as a deed of bargain and sale, containing personal covenants, or promises by the grantor with respect to the title and incumbrances.

The several formal parts of a warranty deed and their order is commonly as follows:

§ 792. **The date.**—This is sometimes inserted in the commencement of the deed and sometimes in the testimonium clause. Its place is immaterial, however, and even though the date be omitted the true date may be proved.

§ 793. **The consideration.**—A good consideration is such as consists of near relationship by blood or marriage. To support a deed between strangers, however, the consideration must usually be valuable, though it need not be adequate. Apart from questions of fraud, an acknowledgment of consideration in a deed is conclusive, and the conveyance can not be directly impeached for lack of consideration. In action for purchase-money or to enforce a vendor's lien, however, the recital in a deed acknowledging the receipt of the consideration may, like any other receipt, be explained or contradicted by oral evidence.

§ 794. **The granting clause.**—This contains the operative words of grant. These are most frequently "give, grant, bargain and sell," which are equiva-

lent in some states to express covenants for title and against incumbrances.

§ 795. **Same—Words of inheritance.**—At common law the word *heirs* is absolutely necessary to convey a fee, and a deed "to A" merely, instead of "to A and his heirs," would give A only a life estate. By statute now, in most states, the word "heirs" is unnecessary, and a grant to a certain person merely will convey to him the fee, or at least whatever estate the grantor has, except where a less estate is expressly limited.

§ 796. **The description.**—The object of the description in a deed is to identify the land conveyed, and if the description is so uncertain that it is impossible to ascertain what land was meant, the deed will be void for uncertainty. The land may be described by reference to natural objects or boundaries, such as rivers, lakes, mountains, etc., or by artificial marks, such as lines, stakes, marked trees, etc., or by courses and distances. Courses and distances, however, will usually be controlled by fixed monuments. Other means of description may also be employed, as by giving the lot, block and ward, where the property is part of a town plat, or by reference to the United States survey. Great care should be taken that the description of the premises conveyed shall be clear, accurate and unambiguous.

§ 797. **Exceptions.**—Anything excepted out of the grant, as the minerals under the soil, is usually described here The description should be as full and accurate as the description of the thing granted.

§ 798. **The habendum—Reddendum—Limitations.**—The habendum is that part of a deed beginning with the words "to have and to hold," and its office is to limit and define the estate conveyed. If the granting part of the deed contains words properly limiting the estate the habendum is unnecessary. The reddendum contains whatever reservations are made in favor of the grantor, as a way or other

easement. Next follow whatever conditions or limitations are agreed upon.

§ 799. **Covenants for title.**—These are commonly:

(1) Of seizin and right to convey.

(2) Against incumbrances.

(3) For quiet enjoyment.

(4) The covenant of warranty.

Upon a breach of any of these covenants the grantor becomes liable to the grantee, and sometimes to those who claim under him, to make compensation in damages. Yet, as the value of these covenants usually depends solely upon the pecuniary ability of the grantor to respond in damages for their breach, their presence should never dispense with a searching investigation of the title.

§ 800. **Covenant of seizin.**—By this the grantor covenants that he is lawfully seized of the premises and has a good right to convey them. In most states the term seizin means that the grantor has the very estate in quality and quantity which he assumes to convey, and the covenant is broken if he has not.

§ 801. **Covenant against incumbrances.**—This covenant is meant to protect against every right or interest in the land which may exist in third persons consistently with the passing of a fee, such as inchoate rights of dower, outstanding mortgages, mechanics' liens, unpaid taxes, conditions and covenants restricting the use of the premises, and private rights of way.

§ 802. **Covenant of warranty.**—This is the most important of all the covenants in a deed, and in many states is about the only one in use. It is practically an undertaking by the grantor, not only for himself, but usually for his heirs, executors and administrators, that he or they will forever warrant and defend the guarantee, his heirs, successors and assigns, against all persons whomsoever lawfully claiming the land. It is broken only when the grantee is evicted by some one claiming under a title paramount to the

grantor, existing at the time the conveyance was made. Before breach this covenant runs with the land, and any person who is owner when a breach occurs may sue therefor. One evicted from the land under title paramount may recover, in most states, only his purchase-price with interest.

§ 803. **Statutory forms of conveyance.**—In many states the legislatures have provided statutory forms of conveyance as brief and simple as the older forms are complicated and verbose, and declared them to have like effect. Their use is optional, and most conveyancers cling to the old forms.

§ 804. **The testimonium clause.**—This clause recites that, "In witness whereof the parties have hereunto set their hands and affixed their seals," etc. It is common for the wife, in this place, by a clause of release, to signify the relinquishment of her dower.

§ 805. **Relinquishment of dower and homestead.**—Dower, which has been already discussed, can not be relinquished or extinguished by the husband alone without the consent and concurrence of the wife, except in a few states where she has dower only in the lands in which he dies seized. She may relinquish her dower, however, by executing the deed concurrently with her husband. In some states she must acknowledge such deed separately after being examined apart from her husband as to the freedom of her act from his constraint.

In most cases the deed of the husband is insufficient to pass the title to the homestead unless the wife joins in executing it in the manner prescribed by the local law.

§ 806. **Signing and sealing.**—In all states signing is probably essential to a valid deed. But if a deed is to be executed in the absence of the grantor, the third person who signs for him must do so by sealed authority. A seal is necessary to a valid deed at common law, and this is so in all states where seals have not been abolished by statute.

§ 807. **Attestation or witnessing.**—No witnesses were required at common law. While in a few states a deed without witnesses is void by statute, in the majority of them it is merely unfit for record, as elsewhere explained, though perfectly good as between the parties. The witnesses should be persons competent to testify at the time the deed is executed. In most states two witnesses are required.

§ 808. **Acknowledgment.**—In nearly all states no deed can be recorded unless duly acknowledged as prescribed by statute, though it will be good as between the parties. In many states, however, a married woman's deed is absolutely void unless acknowledged, as required by the local law.

The acknowledgment is made before a notary public or magistrate, and consists usually in the mere statement of the grantor that he acknowledges the conveyance to be his free act and deed. The officer then certifies in writing, over his official signature, that the deed was acknowledged before him. Often the officer is required to affix his seal. Those making and taking acknowledgments should be governed strictly by the law of the place where the land lies.

§ 809. **Delivery.**—Delivery of the deed by the grantor and its acceptance by the grantee is necessary to make it operative. If the deed is never voluntarily delivered to the grantee, as where he gets possession of it by fraud or force, not even a bona fide purchaser of the land from him will get a valid title.

§ 810. **Registration.**—In all the states are statutes requiring deeds and most other instruments affecting the title to land to be recorded in a specified public office, in order to afford those interested in the title an easy and reliable means of investigating it. As between the parties and as against all persons having actual notice thereof an unrecorded deed is perfectly valid. As against subsequent purchas-

ers and incumbrancers without notice, however, an unrecorded deed is generally declared by the several statutes to be void, provided, in most states, the deed or mortgage to such subsequent purchaser or incumbrancer is itself first duly recorded. In a few states an unrecorded deed is invalid as against attaching creditors of the grantor. In order to be entitled to protection against an unrecorded deed the subsequent purchaser must have been without notice of the prior deed, both at the time he acquired the property and at the time he paid for it.

CHAPTER LIX.

MORTGAGES OF REAL PROPERTY.

§ 811. **In general.**—These securities are important, as they enable investors in land to give safe security for the unpaid price, or to borrow money for the purposes of business, or for the improvement of the estate, upon the stable and permanent security of the land itself. They afford a safe form of investment for the funds of the provident and saving, and are a favored form of investment for funds held in trust.

§ 812. **Definition and general nature.**—The conveyance of an estate or property in land by way of pledge to secure the payment of a debt, such conveyance to become void upon payment being made, constitutes a formal mortgage of real property. The party giving the mortgage is called the mortgagor, the party to whom it is given is the mortgagee.

At common law a mortgage was strictly a conveyance upon condition subsequent, and passed the legal title to the mortgagee, subject to be defeated and revested in the mortgagor upon payment of the mortgage debt strictly at the time agreed upon. Upon failure by the mortgagor so to pay, the estate became absolute in the mortgagee, though its value was far greater than the debt and interest, and even though the mortgagor's default was due to necessity, accident or mistake. The harshness of this rule led equity, at an early day, to treat the condition of forfeiture as in the nature of a penalty, and to hold that, as the conveyance was intended as a mere pledge to secure the payment of the debt, it was enough if it

effected that purpose. The mortgagor might, therefore, redeem the land in equity by paying the debt and interest within a reasonable time. This right to redeem in equity was known as an equity of redemption, and from it grew the practice of filing bills in equity to cut off the mortgagor from his privilege to redeem.

§ 813. **Modern doctrine of mortgages.**—Notwithstanding that a mortgage, in practice, still retains its absolute form, the prevailing view is that it constitutes a mere lien or security upon the land, and that the legal estate remains in the mortgagor, subject to this lien. The mortgagee has no estate in the land, but a lien thereon which will pass to an assignee or purchaser of the debt as security therefor and as an incident thereto. After default in paying the mortgage debt the mortgage is a mere lien or security as before, and the mortgagor may redeem until his right to do so has been cut off by some proper step or proceeding by the mortgagee or those who have succeeded to his rights. In a few states, however, the common law theory of mortgages prevails with more or less modifications.

§ 814. **Form and execution.**—A mortgage of land still retains the form of a deed, similar to an ordinary conveyance, containing a clause known as a defeasance prescribing the condition, usually the payment of money, upon which the conveyance is to become void, and the title is to revest in the grantor or mortgagor. Any deed which shows that it was executed to secure the payment of a debt merely will be construed as a mortgage.

A mortgage should be executed with all the formalities of signing, sealing, attestation and recording, prescribed for making a deed. The wife of the mortgagor should join for the purpose of releasing her dower interest, and, in the case of a homestead, for the purpose of giving validity to the mortgage itself.

§ 815. **The debt secured.**—Substantially the same rules apply here as to mortgages of chattels.[1]

§ 816. **Assignment of mortgage.**—A mortgagee may assign the mortgage and the debt thereby secured. Where the mortgagee's interest is deemed an estate in the land, he must assign the mortgage by a deed, for, under the statute of frauds, all estates and interests in lands must be so transferred. Under the theory, however, that a mortgage is a mere chattel and an incident to the debt, whatever operates as an assignment of the debt carries the mortgage with it in states where the lien theory prevails, and an oral or informal transfer is sufficient, at least as between the parties.

If a negotiable note and a mortgage securing it are transferred before maturity to a bona fide purchaser for value, it is held, as a rule, that such purchaser takes both securities, freed from any equities of defense existing between the mortgagor and mortgagee.

§ 817. **Extinguishment and discharge.**—If, on the day when the debt falls due, the mortgagor pays the mortgage debt, the mortgage is fully discharged, and a tender on that day has the same effect. And this is generally true of a tender made after default in states where the lien theory prevails. In others, if the tender is not accepted, the mortgagor must sue in equity to redeem.

§ 818. **Satisfaction of record.**—If, when a mortgage is paid and satisfied, the mortgage is allowed to remain upon the public records, it constitutes an apparent incumbrance upon the mortgagor's title which the latter, for that and various other reasons, has a right to have removed. By statutes, therefore, in most states, the mortgagor is bound to enter a satisfaction of record after the mortgage is paid and discharged, and is liable to a penalty if he neglects to do so after a request by the mortgagor.

[1] *Ante*, § 594.

§ 819. **Registry and priority.**—The registry laws apply to mortgages of real property in substantially the same way as to deeds absolute, and the rights of subsequent purchasers and incumbrances without notice, and for a valuable consideration, whose deeds or mortgages are first recorded, take priority over parties claiming under a prior unrecorded mortgage.

§ 820. **Remedies incident to mortgages—Suit to redeem.**—Where the common law theory of mortgages prevails, a mortgagor, after default, has no further rights at law. He must bring an action in equity to redeem, accompanying his prayer for relief by a tender of payment into court. The equitable right to redeem exists until it is finally barred and extinguished by what is termed foreclosure.

§ 821. **Foreclosure.**—Foreclosure is the process, by suit or otherwise, by which the mortgagor is debarred from his right to redeem, and the land or its proceeds is applied to the payment of the mortgage debt. In all states this may be by suit in equity, though in many a foreclosure by advertisement and sale is permitted under statutes. In most states what is known as *equitable foreclosure*, or foreclosure by sale, is alone permitted. By this method the property is ordered sold, and the debt, interest and costs paid over to the mortgagee. The surplus, if any, belongs to the mortgagor.

§ 822. **Power of sale mortgages.**—To avoid the delay, annoyance and expense of foreclosure proceedings, mortgages sometimes contain a clause giving to the mortgagee a power or authority to sell the mortgaged premises upon non-payment of the debt, and to apply the proceeds to its liquidation. Though such powers are generally held valid, they do not prevent recourse to the ordinary proceeding by suit to foreclose.

§ 823. **Deeds of trust.**—Similar to power of sale mortgages are deeds of trust. These instruments take the form of a deed of conveyance, wherein the

debtor is the grantor, the creditor is the beneficiary, and the grantee is the trustee upon whom is conferred a power to sell the property upon default, and to apply the proceeds, so far as necessary, to the payment of the debt secured. Such deeds are mortgages in their general nature and effect.

CHAPTER LX.

LANDLORD AND TENANT.

§ 824. **In general.**—The relation of landlord and tenant is the result of a contract, express or implied, whereby one person, called the lessor or landlord, grants the possession of lands and tenements to another, called the lessee or tenant, for a definite time, in consideration of the payment of a compensation called rent. The contract itself is called a lease, and the tenant's interest thereunder is known as a term, tenancy, or leasehold.

§ 825. **Form and execution of a lease.**—In a few states an oral lease for whatsoever term has the force and effect of an estate at will. But, by the statute of frauds, in most states all leases for a longer term than one year are required to be in writing, and in some states leases for more than three, five, seven or some other specified number of years must be by deed, and are invalid against third persons without notice, unless they are executed and recorded like other conveyances of land.

As leases almost always contain covenants upon the part of both parties, they are usually by indenture, *i. e.*, a writing signed in duplicate, each party retaining a copy.

While technical terms are commonly employed and their use is advisable, they are not essential, provided the intention to create the relation of landlord and tenant is clear.

§ 826. **The term.**—A certain beginning and a certain ending are essential to a good lease for years.

Usually the term is expressed as for so many years or months from a given day, or by specifying the date of beginning and ending.

§ 827. **The words of leasing.**—These are usually "lease, demise, and let," and should be employed, as they usually imply certain covenants upon the part of the lessor, which might not always result if other words were used.[1]

§ 828. **Description of the premises.**—Unless the premises are described with sufficient accuracy to identify them, the lease will be void for uncertainty. But it is not customary to describe the premises with the same particularity as in a conveyance of the fee, nor is it always advisable to do so, as too much detail may tend to confusion and uncertainty.

§ 829. **Rent and the reservation of rent.**—Rent commonly signifies a periodical payment of money for the use of the premises. But it may be lump sum in money, or it may be payable from time to time in produce or services. The usual words reserving rent are, "the said lessee, yielding and paying."

§ 830. **Conditions of forfeiture and re-entry.**—It is often provided that upon certain conditions or contingencies the landlord, or sometimes the tenant, may terminate the lease. The conditions upon which it is most frequently provided that the landlord may declare the lease terminated and re-enter the premises, are non-payment of rent, failure to repair or pay taxes, breach of the covenant not to assign or sublet, and of covenants not to use the premises for certain purposes, as for the sale of liquor. But if the lessor wishes to enforce a forfeiture for the breach, the right to declare a forfeiture will be waived where he expressly assents to the acts complained of, or accepts rent accruing after the breach occurred and with knowledge of it.

§ 831. **The covenants—Lessor's implied covenants.**

[1] *Post*, § 925.

Covenants in leases are either express or implied. The lessor impliedly covenants, at least where the technical words "of lease" are used, that the tenant shall have the quiet enjoyment of the premises during the term. But this covenant applies only to the acts of the lessor and persons having paramount title and not to trespass by strangers. The lessor is under no implied covenant to repair. Neither, in general, does he covenant that the premises are tenantable or fit for any particular use.

§ 832. **Lessee's implied covenants.**—A covenant to pay a reasonable rent is implied, though none is expressed. The tenant is also bound to treat the premises in a tenant-like manner, and must commit no waste.[1] He must cultivate farming lands in the usual manner and in a way consistent with good husbandry. But he is not bound to repair, in the absence of an express covenant to do so, except that he must keep the buildings wind and water tight and deliver the premises back at the end of his term in substantially the same condition as he received them, ordinary wear and tear excepted. Unless the tenant has expressly covenanted to repair, he is not answerable for accidental damage, nor is he bound to rebuild structures accidentally destroyed, or do anything by way of ornament merely.

§ 833. **Lessor's express covenants.**—These are usually for quiet enjoyment, to repair and to renew the lease. Unless the landlord has expressly covenanted to repair he is not bound to do so. Neither, generally, is it any defense to a suit for rent that the landlord has suffered the premises to get out of repair, even to the point of rendering them uninhabitable, unless he has covenanted to repair. Where the landlord has expressly covenanted to repair, the obligation will be enforced, and the tenant, when sued for rent, may recoup any damages he may have sustained through the landlord's failure to do so.

[1] *Ante*, § 779.

The landlord is bound to renew the lease only where he has covenanted to do so. A single renewal satisfies this covenant, and the tenant can not demand that the renewal lease shall contain a covenant to renew again.

§ 834. **The lessee's express covenants.**—A lessee who expressly covenants to pay rent is personally bound therefor, and can not, by assignment, rid himself of the obligation to pay, unless the lessor accepts a surrender of the premises and accepts the assignee as tenant in his place.

The tenant is not relieved from his covenant to pay rent by the total or partial destruction, by fire or other casualty, of the buildings on the leased premises, unless by local statute or by the express terms of the lease. A clause is very often inserted in the lease, therefore, to the effect that if the premises be partially damaged by any casualty or cause, save the neglect of the tenant, the same shall be repaired as speedily as possible at the expense of the landlord; and that if the damage be such as to render the premises untenantable, the rent shall cease until they are restored; but that in case of their total destruction the lease shall cease and determine at the option of the tenant. Where the lease is of an apartment in a building, and not of the premises further than is necessary to the enjoyment of such apartment, destruction of the building terminates the lease, even where there is no such saving clause.

§ 835. **Same—Covenants against assignment and subletting.**—In the absence of a restrictive covenant, the lessee may assign his interest or sublet the premises. A covenant against assignment alone does not prohibit subletting, and vice versa.

§ 836. **Same—To deliver up premises in good repair.**—The lessee usually expressly covenants to the effect that he will deliver up the premises peaceably to the lessor, at the end of his term, in as good repair as when he received them, ordinary wear and

tear and damage by accidental fire and the elements excepted. The lessee who has covenanted to repair is, in the absence of statute, bound to rebuild buildings destroyed by fire or other accidental cause, unless by the covenant itself he is expressly relieved from that duty in such cases.

§ 837. **Assignment of lease—Subletting.**—Unless restrained by statute or covenant, either the lessor or lessee may assign his interest without the consent of the other. Leases commonly contain a covenant by the tenant, however, that he will not assign the lease, or sublet the whole or any part of the premises without the consent of the landlord. If the tenant parts with his entire interest under the lease, this usually constitutes an assignment, but if he parts with less than this entire interest, it is a subletting.

§ 838. **Same—Form of assignment.**—In some states a lease required by law to be under seal must be assigned by a writing under seal, and a lease required by the statute of frauds to be in writing must be assigned by writing. Though no particular words are necessary to an assignment, the words "grant, assign and set over," are usual and proper. The assignor usually covenants that the assignee shall have the quiet enjoyment of the premises, free from any harm by reason of incumbrances, and the assignee covenants to pay the rent and perform the other covenants of the lease or to save the assignor harmless therefrom.

§ 839. **Rights and liabilities of the assignee.**—The assignee takes all the interest of the original lessee under the lease, and is bound to perform all the covenants of the lease, so far as they touch and concern the estate. He is bound to pay rent, to perform the covenants to pay taxes, to repair, to use or cultivate the land in a particular manner, not to carry on a particular trade or business on the premises, and to commit no waste.

§ 840. **Liabilities and rights of the assignor.**—Notwithstanding the assignment of the lease, even with the consent of the lessor, the original lessee remains bound by all the express covenants of the lease. He is, therefore liable to pay rent, at least, if he is expressly covenanted to do so. But if there is no express covenant to pay rent, the assignor is discharged if the landlord accepts rent from the assignee or otherwise recognizes him as tenant.

§ 841. **Effect of subletting.**—By a subletting the subtenant becomes the lessee of the principal tenant, who remains liable to the landlord as before.

Termination of Lease.

§ 842. **Lapse of time.**—A lease for a definite time will expire at the end of that time. So a lease may be determined by the happening of any event upon which it was expressly agreed that it should terminate, as upon the death of either party, or upon the sale of the premises.

§ 843. **Forfeiture for breach of condition.**—The tenancy may be terminated where the landlord takes advantage of a stipulation, expressly authorizing him to re-enter and put an end to the tenancy for breach of some condition contained in the lease. But mere breach of such condition, without any steps being taken by the landlord, will not terminate the lease, for it is optional with him whether he will take advantage of the breach or not. A forfeiture must be declared and enforced promptly, and a slight circumstance will often be deemed a waiver of the breach. A waiver will be implied where the landlord accepts rent accruing after the breach, and with full knowledge that the condition has been broken. A forfeiture for non-payment of rent must always be preceded by a strict demand, and in some states by a notice prescribed by statute.

§ 844. **Surrender.**—The tenant may voluntarily

yield up his interest to the landlord who accepts the surrender, as such yielding up is called. An express surrender of a term for more than one year must be by writing under the statute of frauds.

§ 845. **Eviction.**—If the tenant is evicted from the premises, either by the landlord or some one claiming by a paramount title, this terminates the lease. An eviction by the landlord may be actual or constructive. If he willfully expels the tenant from the premises or any part of them, this is an actual eviction. A constructive eviction arises where, though the tenant is not actually expelled from the premises, the landlord does that which deprives him of their substantial enjoyment.

§ 846. **Summary remedies between landlord and tenant.**—There are various summary remedies given by statute for the enforcement of the tenant's duties, and for the recovery of the possession of the premises by the landlord, in case of non-payment of rent or breach by the tenant of some other covenant affording ground for a forfeiture. These remedies being local and statutory can not be examined here.

Distress is a remedy whereby the landlord may seize, by his own act, the personal property of the tenant upon the premises and hold it or sell it to enforce payment of rent. This remedy has been abolished in some states, and in others it is largely regulated by statute.

§ 847. **Tenancy at will and from year to year.**—A tenancy determinable at the will of either party is called a tenancy at will. The tenant at will is liable for waste and is entitled to emblement, unless the tenancy was terminated by his own act.[1]

Owing to the hardships too frequently resulting from the arbitrary termination, by the landlord, of tenancies at will, it became the law that where rent was reserved and paid by the lessee, the lessor could not terminate the lease without giving notice

[1] *Ante*, § 774, 780.

to the lessee, nor could the latter do so without notifying the lessor. Thus grew up a very common class of tenancies known as tenancies from year to year. Thus, where a weekly, monthly, quarterly, or annual rent is reserved, and nothing is said about the duration of the tenancy, the leasing is usually deemed to be by the week, month, quarter, or year, and from one such period to another, so long as neither party gives notice, a sufficient length of time before the end of the current period, that he desires to terminate the tenancy at the end of such period. Whatever may be the period, the phrase, "tenancy from year to year," is proper, though the phrases "tenancy from week to week," or "from month to month," etc., are more explicit where the periods correspond. These tenancies frequently arise where the tenant holds over after his term has expired. Where a tenant for a fixed term holds over, the landlord may treat him as a trespasser, or he may elect, in most states, to treat him as a tenant for another year, or for another week, month, or quarter, if that was the duration of the original term. The landlord will be deemed to have elected in favor of a tenancy for another period, where he allows the tenant to remain in possession and accepts rent, unless his acceptance of rent is upon the express condition that the tenant is to hold at will merely.

§ 848. **Same — Notice to quit.** — A tenancy from year to year, from month to month, etc., may be determined only by a notice to quit, given either by the landlord to the tenant, or by the tenant to the landlord. This notice is a declaration by the party seeking to terminate the tenancy, that he elects to do so at the end of the current period. In order to terminate the tenancy, however, the notice must be given the length of time prescribed by law before the expiration of such period. In the case of a tenancy strictly from year to year, the common law requires the notice to be given at least six calendar months

before the expiration of the current period. But statutes frequently prescribe a notice of three months or even less, and in the case of tenancies from month to month, the time of the notice is shorter, usually being equivalent to the entire period of letting. But this whole matter is usually regulated by local statutes, which often require notice to quit, even in the case of tenancies at will. The notice required to terminate these periodical lettings has no reference to the notice required where the landlord is seeking to declare a forfeiture and recover the premises on account of non-payment of rent, or for breach of some other condition or covenant in the lease.

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[1] *Ante*, § 774.

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PRACTICAL

CASES AND QUESTIONS FOR QUIZ AND REVIEW

ON

SPENCER'S COMMERCIAL LAW.

LAW IN GENERAL.

1. Define law in its narrow or proper sense—the sense in which you are studying it.

2. By what authority is such law enforced?

3. What is meant by moral law, and how is it enforced?

4. What do you understand by common or customary law, and from whence is our common law derived?

5. What are the evidences of the common law?

6. What is equity?

7. Of what does written law consist in this country?

8. What is meant by the term unconstitutional as applied to a law?

9. Define property or the right of property?

10. Into what two classes is property divided?

11. State some of the reasons why it is important to distinguish between real and personal property.

12. Distinguish between choses in possession and choses in action.

13. Are there other kinds of incorporeal personal property besides choses in action, strictly speaking? If so, give an example.

14. Tell what is meant by title, and state four methods by which title may be acquired.

15. Through what means or agency must legal remedies usually be sought?

16. By what means is the judgment of court for money damages commonly enforced?

17. What are exemption laws, and what is their policy and purpose?

18. What is the nature of attachment and of garnishment and how do they differ?

19. State what is meant by injunction, and give an example of its use.

CONTRACTS.

1. (*a*) Define a contract and distinguish between an executed and executory contract. (*b*) Distinguish between sealed and simple contracts. (*c*) Tell how a sealed contract is made. (*d*) Distinguish between express and implied contracts. (*e*) What is the difference between a contract implied in fact and one implied by law? (*f*) Give the elements of a simple contract.

2. A sells to B all the wheat in a certain bin and agrees to keep it for A's accommodation until the following day. In the meantime the wheat is burned, without A's fault. Does the loss fall upon A or B?

3. X makes a deed in favor of Y, but says nothing about it and locks it away in his safe. X dies, and the deed is found among his papers. Can Y claim any rights by virtue of it?

4. A son employs a lawyer to contest his father's will without saying anything about fees or compensation to the attorney. The attorney prosecutes the contest diligently and skillfully. May he recover for his services, and if so, how much?

5. A daughter remains in her father's household after reaching her twenty-first year, receiving the same support and being treated upon the same footing as before. Nothing having been said about the matter, is she entitled to charge for such domestic services as she was previously accustomed to render? *See* Geary *v.* Geary, 67 Wis. 248; Tyler *v.* Burrington, 39 Wis. 376.

6. A owes B a sum of money, but by mistake in computation pays B more than is his due. Has A a remedy to recover the excess? *See* Needles *v.* Burke, 81 Mo. 573.

CONSIDERATION.

1. (*a*) Distinguish between good and valuable considerations. (*b*) Is marriage a valuable consideration? Frank's Appeal, 59 Pa. St. 190.

2. A father intending to make his son a gift of the amount gives his note to the latter, payable in sixty days. At the maturity of the note the father refuses to pay. Has the son a remedy on the note?

3. The owner of certain boilers gave another party permission to weigh them, on the latter's promise to return them in good condition. What consideration was there for the borrower's undertaking to return them safe? Bainbridge *v.* Firmstone, 8 Ad. & E. 743, s. c. Law Ld. Cas. Simp. 29.

4. A wishes to borrow money of B, who agrees to lend it, provided C will guarantee A's note for the amount. C thereupon makes the guarantee. What consideration is there for C's undertaking? Leonard *v.* Vandenburg, 8 Johns. (N. Y.) 29.

5. A, without fraud or other wrong, agrees in writing to sell certain land for one-half its value. Is he bound by the contract?

6. A agrees to sell and B to take and pay for certain goods at a certain time and place. What is the consideration for the promise to each party?

7. A and B are engaged in a controversy growing out of an honest difference as to the grade and quality of certain wheat, supplied by A to B, and which B claims was not as warranted. To put an end to the dispute, and to avoid a law-suit, A gives B his note for $50 in full settlement. What is the consideration for the note? Clark *v.* Turnbull, 47 N. J. Law 265.

8. A sells goods to B without warranty and receives the price. Afterward B expresses himself as dissatisfied with the goods and A agrees to warrant them free from certain defects. Is A bound by his warranty? Summers *v.* Vaughan, 35 Ind. 323.

9. A debt is barred by a discharge in bankruptcy. The bankrupt, becoming prosperous, makes a promise to one of his credit-

ors to pay the amount of a debt so barred or discharged. Is the new promise binding? What is the consideration for it? Allen *v.* Ferguson, 18 Wall. 1; St. John *v.* Stephenson, 90 Ill. 82.

10. A party gave his note for shares in a certain company, working under patents supposed to be valuable. Later inventions made these patents worthless, and the stock of the company became of no value. Could the purchaser, in the absence of fraud, defend against payment of his note in the hands of the one from whom he bought the stock? Gore *v.* Mason, 18 Me. 84.

OFFER AND ACCEPTANCE.

1. A offers to meet B at a certain time and place, in order that they may attend the theater together. B accepts the offer, but fails to keep the appointment. Is he liable to A?

2. The payee of a note agrees with the maker that he will extend it at maturity if the maker desires, no time of extension being mentioned. Is the payee bound by his promise to extend?

3. A by letter offers B a certain sum for doing certain carpenter work. B determines to accept and buys material with which to do the work, but before he does anything to communicate his acceptance to A, the latter notifies B that the offer is withdrawn. Can B recover of A for trouble and expense? White *v.* Corlies, 46 N. Y. 467.

4. A offers by letter to sell B 2,000 to 5,000 tons of iron rails at a certain price. B answers ordering 1,200 tons. Must A either fill the order, or pay damages?

5. A party offers to sell goods at a certain price provided an order from them is sent by return mail. The offeree neglects to answer for two days and then accepts. Is the seller bound? Maclay *v.* Harvey, 90 Ill. 528.

6. A, without receiving anything of value for holding his offer open, gives B an option to purchase certain property within one

week at a price named. At the end of three days, A notifies B that the offer is withdrawn. Can B still accept within the week and hold A bound? Dickinson *v.* Doods, L. R. 2 Ch. Div. 463; Minneapolis, etc., R. R. *v.* Columbus Rolling Mill, 119 U. S. 149.

7. An offer to sell goods is sent by mail and is promptly accepted by a letter properly addressed and post-paid. Before the letter of acceptance has been received by the offering party, but after it was mailed, the offering party mailed a letter retracting his offer. Is there any contract? How would the case stand if the letter of withdrawal had been received by the offeree before he mailed his acceptance? How would it stand if the letter of withdrawal had been received by the accepting party after the acceptance was mailed, but before it had been received by the offering party? Tayloe *v.* Insurance Co., 9 How. (U. S.) 390; Wheat *v.* Cross, 31 Md. 99.

8. A, whose wife is in a burning hotel, offers $1,000 to any one who will bring her out, dead or alive. A bystander, at the peril of his life, brings out her dead body. Can he recover the money? Reif *v.* Paige, 55 Wis. 496.

9. The defendant, by advertisement in the Chicago *Record*, offered a definite reward for information of the whereabouts of a certain person. No longer having an interest in the matter, he published in the same paper, for an equal length of time and with equal prominence, a retraction of the offer. After this, X, who knew of the offer but not of its retraction, procured the information. Can he recover the reward? Shuey *v.* United States, 92 U. S. 73.

PARTIES TO CONTRACTS.

1. A subject of Spain sold to an American citizen, prior to the Spanish-American war, a large quantity of tobacco on credit. The debt was due when the war broke out. Could it be recovered by suit during the war? Could it be recovered afterward? Dunlop *v.* Ball, 2 Cranch 180.

2. Who does the common law deem infants or minors, and state what statutory change has been made in some of the states.

3. An infant buys a quantity of goods, including clothes, reasonable in quantity and quality in view of his circumstances, and at the same time and from the same tradesman purchases articles for amusement merely. He promises to pay $50 for the clothes and $50 for the other articles. The clothes are really worth about $25. How much, if anything, is the tradesman entitled to recover, the articles of amusement having been lost or consumed? Bent *v.* Manning, 10 Vt. 225.

4. An infant is taken ill and employs a physician. Can the latter recover his reasonable fees?

5. An infant engaged in business took out a policy of insurance on his stock in trade. Is his infancy a good defense to an action for the premiums? Insurance Co. *v.* Noyes, 32 N. H. 345.

6. An infant borrows money and gives a mortgage on his team of horses to secure its repayment. Can the mortgage be enforced? Miller *v.* Smith, 26 Minn. 248, s. c. 37 Am. R. 407.

7. An infant bought on credit clothing suitable to his age, means and station in life. It turned out that he had already been amply supplied with wearing apparel, but the tradesman was ignorant of the fact. Can the latter recover the reasonable value of the clothing, the infant or his guardian having offered to return it? Barnes *v.* Toye, 13 Q. B. Div. 410; Davis *v.* Caldwell, 12 Cush. (Mass.) 512.

8. (*a*) May an infant ratify his voidable contracts before he becomes of age? (*b*) May he avoid his contracts for non-necessaries while still a minor? (*c*) May he avoid his deed of land while under age?

9. An infant of twenty leases his lands for five years. After reaching full age he receives rent accruing on such lease since his twenty-first birthday. Can he now avoid the lease?

10. An infant purchased a piano on credit. She continued to use the instrument for six months after coming of age and then offered to return it. The seller refused to take back the instrument and sued for the price. Was he entitled to recover?

11. An infant gave his note for borrowed money and said nothing about the matter for a year after coming of age. Can he now plead his infancy if sued on the note?

12. An infant hires out as a book-keeper for one year. At the end of six months he repudiates the contract and quits the employment. Can he recover for the services already rendered?

13. A monomaniac, on the subject of religion, but not under guardianship, leases his farm for a fair rental and on the usual terms, apparently uninfluenced by his derangement. Is the lease valid? How would the case be in most states if the lunatic were under guardianship when the lease was made? *See* Wray *v.* Wray, 32 Ind. 126; Mohr *v.* Tulip, 40 Wis. 66.

14. A person slightly intoxicated bought property at a fair price. Can he avoid the contract when he becomes sober?

15. (*a*) What is the status of a wife's personal contract at common law? (*b*) May she act as agent for her husband under that law? (*c*) What remedy has a wife to realize her right to support if abandoned by her husband, she being without fault?

16. What have you learned from your teacher, or from the statutes, or other sources as to a wife's power to hold and dispose of property and to make contracts in your own state?

CONTRACTS THAT MUST BE IN WRITING.

1. What was the object of the English statute of frauds, the evils it was designed to remedy, and the method it took to remedy them? Has this statute been much copied in the states of this country?

2. Enumerate the contracts affected by this statute.

3. A orally agrees to sell to B all the standing pine on a certain tract of land. When B comes to cut the pine, A forbids him to enter upon the land. Is B entitled to damages for breach of the contract? Would he be a trespasser if he entered and took

the pine after A forbid him? What would be his remedy if he had paid the purchase price in advance? Would your answers be the same if the sale had been of a growing crop?

4. On March 1, A, without writing, employed B to act as his book-keeper for one year from April 1. B entered upon the employment and served three months, when he was discharged without cause. Is A liable as upon a hiring for a year? If not, has B any remedy on account of the service rendered?

5. A farmer orally agreed to deliver to X all the hay his farm produced during three successive years. He refuses to deliver any hay the second season. Has the purchaser a remedy? Had the farmer delivered the first season's crop, could he recover its price or value, though he then notified that he would make no further deliveries?

6. A son received a sum of money from his father, in return for which he orally agreed to support the latter until he died. Is the son bound?

7. A written contract for the sale of land reads: "I, J. Smith, agree to sell C. Watson my farm in Washington county, Wisconsin, at the price and on the terms agreed upon between us this day. J. Smith." Is this a valid contract? Give reason.

8. Is this a valid guaranty of a promissory note in your own state, when given merely to secure the debt of another? "I hereby guarantee the payment of the within note." (Signature.) Give reason.

REALITY OF CONSENT.

1. A and B bargained for a stack of wheat on A's land in another county. Unknown to either, the wheat was burned the evening before by fire set by a locomotive. Was there any contract?

2. A contracted to give B a deed of lot 1 in a certain block.

By mistake or fraud on the part of A the deed described lot 2. What remedy has A under these circumstances?

3. (*a*) Define fraud. (*b*) State the usual elements of a fraudulent misrepresentation.

4. A represents to B that a certain horse is sound, with intent to induce B to purchase it. B examines the horse and discovers that he is unsound, but nevertheless purchases him. Can B rescind the contract or recover damages as for fraud?

5. A bought a horse of B for $100 on B's false representation that he was "a good horse and easily worth the money." Can A rescind or recover damages on the ground of fraud?

6. A, knowing his own insolvency, and with intention never to pay, bought goods of B. Nothing was said about A's solvency or ability to pay. May B rescind the contract on the ground of fraud and recover his goods from A? Can he recover them from X who has purchased them from A and paid for them without notice or knowledge of any wrong? Donaldson *v.* Farwell, 93 U. S. 631.

7. A ward who has just come of age conveys valuable property to his late guardian. In an action by the ward to have the deed set aside on the ground of undue influence and fraud, must the ward prove fraud or must the guardian prove fairness?

8. A's mother is threatened that unless she gives her note for $500, her son will be arrested and prosecuted for forgery. Is the note valid?

9. A party arrested on valid criminal process gives a bond to secure his release from imprisonment pending the trial. Is the bond good?

ILLEGAL CONTRACTS.

1. A contracts for the sale and delivery of liquors to B in a state where such sale is directly prohibited by statute. Can he recover the price of such liquors if they are already delivered?

If not, then can he recover the liquors themselves? Can B sue A for non-delivery of the liquors?

2. A statute on grounds of public policy provides a penalty for "doing any business," etc., on the Sabbath day, though business on that day is not directly and in terms prohibited. Is a merchant's contract for advertising made on Sunday valid? Larned *v.* Andrews, 106 Mass. 435.

3. Under the above statute would a note for money borrowed on Sunday be valid in the hands of the payee if it was dated on Saturday?

4. A bet $50 on an election. Can B, the winner, recover the money? Could he recover on A's note given on account of such bet? Could he demand the money from the stakeholder before the bet was decided and recover it by action?

5. A, in form, contracts to sell and deliver to B, at a certain future date and price, a quantity of grain. It appears, however, that neither party intended that any grain should be delivered or taken and paid for, but that only the difference between the market price and the contract price should be paid by one party to the other, depending upon whether the market price on the day of delivery was greater or less than the contract price. Is the contract valid? Give reason.

6. A manufacturer of wagons sold his factory, tools, stock, material, brands, marks and good-will to another and agreed with the purchaser that he would not, during a period of five years, engage in the business of manufacturing wagons, without limitation as to space. Is the seller bound? State principle. Diamond Match Co. *v.* Roeber, 106 N. Y. 473.

7. A promises B that if B would sign A's bond as tax assessor he would, if elected, appoint B his deputy. Is the contract binding?

8. A agreed to pay a sum of money to B in part satisfaction of his loss in consideration that B would forbear from further prosecuting C for embezzlement. Is the contract valid?

9. A, who has forged B's acceptance, which B had paid, offered him new paper in satisfaction of his loss. Nothing was said about not prosecuting. Is the new paper valid?

10. A sells his property with intent to put the proceeds beyond the reach of creditors. Can B, the purchaser, having full knowledge of the facts, hold such property against A's creditors? Can he hold it against A? Could he hold it against creditors if he was ignorant of A's scheme to defraud?

11. A party in debt conveys his property to his wife without consideration, thus rendering himself insolvent and unable to pay his debts. Is the conveyance valid against creditors? Horton *v.* Dewey, 53 Wis. 413.

12. An embarrassed debtor wishes to compound with his creditors at fifty cents on the dollar. A creditor who holds back is induced to unite in an agreement to release the debtor on consideration of seventy-five cents on the dollar of his debt. If this agreement is not known to the other creditors, are they bound by the compromise?

13. A loans his own money to B at the highest lawful rate of interest, charging B 5 % additional as "commission" for making the loan. Is the contract usurious? Fanning *v.* Dunham, 5 Johns. Ch. 122, 9 Am. Dec. 283.

INTERPRETATION OF CONTRACTS.

EVIDENCE.

1. A note was expressly payable "on demand." Can the maker, when immediately sued by the payee, give oral evidence that the latter agreed when the note was given not to call for payment until the expiration of a year? Can the maker orally prove as a defense to such suit that the note was procured by fraud or duress, or that the consideration was illegal? Wells *v.* Baldwin, 18 Johns. (N. Y.) 45.

2. A chattel mortgage was intended by the parties to cover a stock of goods and fixtures in a certain store. By oversight in reducing the mortgage to writing the fixtures were not included.

Can the mortgagee prove what the real agreement of the parties was so that the mortgage may cover the fixtures?

3. A written contract to build a house was subsequently modified by oral agreement so as to give the contractor more time to complete it. May such oral agreement be shown?

4. In an action for breach of a contract for the delivery of shingles, is the defendant entitled to show by oral evidence that by usage in the lumber trade the term "thousand" does not mean a thousand by actual count, but two bundles of a given size? Soutier *v.* Kellerman, 18 Mo. 509.

5. In a suit by A against B for a certain demand, A offers oral evidence that by usage of the particular business in which the parties are engaged interest is uniformly charged and paid on such demands. Should the evidence be received, the contract being silent on the subject of interest?

6. A policy of insurance by a written clause insures certain property in the hands of A, "whether owned by him absolutely or held in trust for others." Is it avoided by a printed clause providing that, "If the interest of the insured be other than the sole, absolute and beneficial ownership, the policy shall be void?"

DISCHARGE OF CONTRACT.

DISCHARGE BY PERFORMANCE.

1. A agrees to build a house for B at a certain price, according to certain plans and specifications, but before anything has been done or paid on either side the parties mutually agree that the contract shall be rescinded. Can either party sue the other for breach?

2. A owes B $50, and B owes C $50; it is agreed between A, B and C that A shall stand indebted to C, and that all other indebtedness between the parties shall be lifted. Is A liable to B, or B to C on the orginal indebtedness? What is the technical name for such a transaction?

3. A deeds a tract of land to B; afterward, with the intention to reconvey the land, B hands the deed back to A. Is the title revested in A?

4. A agrees to deliver to B, on June 1, a number of cases of eggs, but he does not tender the delivery until June 2, when B refuses to take and pay for them. Is B liable for damages for his non-performance of his contract? If not, is A liable to B for non-performance?

5. A agrees to fix the heating apparatus in a certain theater, but no time is fixed within which the contract shall be performed. How long a time will be allowed to A in which to finish the repairs?

6. A gives his note to B for $100 on account of money loaned. If the note specifies no time of payment, when is it legally due?

7. A innocently pays B a $50 counterfeit bill; B discovers the nature of the money that same day but delays notifying A for two weeks, whereupon A is unable to trace the parties who paid the money to him. Is B entitled to recover good payment from A?

8. A gives his note to B for money loaned and pledges certain chattels to secure its payment. At the maturity of the note a new note was given in renewal of the old one. Does this pay the first note and discharge the pledge which was given to secure it, there being no express agreement on the subject?

9. A, of Milwaukee, owes John Jung, of Juneau, Wisconsin. Jung writes to A telling him to remit the amount by bank draft, addressed to John Jung, Juneau, Wisconsin. A does so, but the draft falls into the hands of another party named John Jung, residing in Juneau, who converts the proceeds to his own use. Is A liable to pay again at the suit of his creditor, Jung? Jung *v.* Bank, 55 Wis. 364.

10. A owes B $500. On Monday he pays B $200 and takes his receipt for the amount; on Wednesday he pays $100 more and asks and receives from B a receipt for $300, the full amount paid to date. Nothing more being paid, A sues for the balance due, and B produces receipts aggregating $500. Are these receipts decisive of the case in the absence of all explanation? Will B be permitted to satisfy the jury, if he can, that only $300 was really paid?

11. (*a*) Define tender and state generally the effect of a valid tender of money. (*b*) In this country, what authority declares what shall be legal tender, and what has been made legal tender by that authority?

12. A owes B $740 and tenders him $720, believing in good faith that this is the real amount due. Is such tender of any effect?

13. A owes B $50, and offers to pay it on condition that he is given a receipt in full of account to date. B refuses to accept the money on that condition. Is the tender good? Sutton *v.* Hawkins, 8 C. & P. 259.

14. A owed B $60 and tendered him a certified check for that sum. B objected to the tender on the ground that the amount was not enough. Upon a plea of tender being made B attempted to shift his position and objected for the first time that the offer of payment was not in legal tender money. Is his objection well taken?

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.

1. A carrier contracted, without condition or exception, to deliver certain goods in St. Louis by a certain date. He was prevented from delivering them on time by a violent snow storm. Is he liable for breach of contract? Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

2. A agreed to work for B six months for given wages. At the end of three months B was forced to abandon the employment by reason of a broken leg. Is he entitled to recover anything for the service actually rendered?

DISCHARGE BY OPERATION OF LAW.

1. (*a*) When is a contract said to be discharged by merger? (*b*) What is the general nature and object of bankruptcy laws, and what is the effect of a discharge in bankruptcy? (*c*) By what law is the subject of bankruptcy now regulated in this country? (*d*) What effect has death upon an ordinary contract for the payment of money?

2. (*a*) A contractor agrees to build a house for B according to certain plans and specifications. A dies before the house is

completed. May his executor complete it and recover the contract price? (*b*) If the executor fails to complete it, is A's estate liable in damages?

3. The holder of a note, with fraudulent intent, and without the consent of the maker, changes the date so as to hurry the time of payment. What effect has this alteration upon the validity of the note? What effect has it upon the right of the holder to recover upon the original consideration? Woodworth *v.* Anderson, 63 Iowa 303.

4. A note is expressed to be payable with interest, no rate being named. The holder, without the consent of the maker, fills in the legal rate in the state where the note is made and payable. Has this alteration any effect upon the instrument?

5. A deed of land is so altered by the grantee, without the consent of the guarantor, as to include lands not covered by the original description. Does this revest in the guarantor the title to the lands originally granted?

DISCHARGE OF CONTRACT BY BREACH.

1. A agreed by charter party to load a cargo on B's ship at Odessa. After the ship arrived there A told her captain that he had no cargo and that he had better go away, but the master continued to demand the cargo, and before the lay days had expired war rendered the performance of the contract unlawful. Could B afterward sue A for breach of contract? Avery *v.* Bowden, 5 E. & B. 714.

2. If A promises to marry B on a future day, and before that day arrives marries another woman, is B bound to wait until the day fixed by the contract has arrived before suing A for breach of promise? Burtis *v.* Thompson, 42 N. Y. 246.

3. A agrees to sell and deliver to B certain goods at a certain time and at a certain price, and B agrees to take and pay for them on delivery. What acts upon his part must be shown by B in an action to recover of A for non-delivery of the goods as agreed?

4. A celebrated singer who was to take the principal female part in a new opera at a certain compensation failed to appear on the opening and several succeeding nights, whereupon the man-

ager treated the contract of employment as at an end. Was he justified in so doing? Proussard *v.* Spiers, 1 Q. B. D. 410. Comp. 1 Q. B. D. 183.

5. A employed B as his servant for a term of six months with the understanding that B was to remain steadily at work and to refrain from the use of intoxicating liquors. At the end of two months B was absent several days on account of intoxication. When he returned he was permitted to work for several days. Could A now discharge him on account of his absence and intoxication?

REMEDIES FOR BREACH OF CONTRACT.

1. Define damages and state whether common law affords any other remedy for the breach of a contract.

2. What is the object of awarding damages for breach of contract—to punish the defendant, or to indemnify the plaintiff for his loss, or is it both?

3. What is the usual measure of damages for breach of contract to pay money at the appointed time?

4. What are nominal damages? What are liquidated damages?

5. Distinguish between liquidated damages and a penalty.

6. What are exemplary damages, and in what class of cases are they awarded?

7. The contract for the payment of money only on a day certain provides that upon default in paying upon the appointed time the defendant should pay double the amount by way of liquidated damages. What damages can be recovered for breach of the contract?

8. A makes a valid contract to sell B a tract of land which the latter desires as a homestead. A refuses to convey at the appointed time. What is the most efficient remedy open to B either at law or in equity?

DISCHARGE OF RIGHT OF ACTION.

1. What is the statute of limitations and what is its policy and purpose?

2. After the lapse of what time, if any, does the common law presume the payment of a debt? *See* Bean *v.* Tonnele, 94 N. Y. 381.

3. How long a time, in your state, has a creditor to sue on a simple contract, and within what time must he bring an action for the enforcement of a sealed one?

4. A gives his note to B specifying no time of payment. When does the statute of limitations begin to run against B? Would your answer be the same had the note been expressly payable on demand?

5. Goods are sold on thirty days' time. When does the statute of limitations begin to run against the debt for the price?

6. The payee of a note is twenty years of age when it falls due. When does the statute of limitations begin to run against him?

7. A duns B for a debt of $50, which is outlawed. B denies that he owes the money, but A insists, and, in order to induce B to pay, refers to the poverty and the distress of his family. B hands A a twenty-dollar gold piece saying, "there; I do not owe you anything, but take that." Was the giving of the $20 such part payment as will prevent B from setting up the statute of limitations when sued for the balance? *See* Hale *v.* Morse, 49 Conn. 481.

8. A owes B $50 but agrees to take $25 in full discharge of the debt. The debt is due and there is no dispute as to its validity or amount. Is B bound by his agreement, accepting the $25 in full, or can he still sue for the balance? Would the case be altered at all if B had accepted the $25 in full for the debt, on condition that it was paid before anything was due? Cumber *v.* Wayne, 1 Smith's Lead. Cas. 439, and notes.

9. Define arbitration and award.

10. A and B agree to arbitrate a dispute which has arisen be-

tween them, but A breaks his agreement to arbitrate and carries his case into the courts. Will they take jurisdiction to grant him relief, or will they refuse it upon the ground of his previous contract to arbitrate? If they will grant relief, then of what force is the contract to arbitrate? *See* Tattersall *v.* Groote, 2 B. & P. 131; Phœnix Ins. Co. *v.* Badger, 53 Wis. 283.

NEGOTIABLE CONTRACTS.

1. (*a*) What is meant by a negotiable contract, and what is the peculiar function of negotiable instruments? (*b*) What instruments are commonly negotiable? (*c*) Distinguish between assignability and negotiability. (*d*) Define bill of exchange and distinguish between foreign and inland bills. (*e*) Describe a set of exchange and tell why and how it is used.

2. Is the following note negotiable: "Thirty days after date I promise to pay to bearer one hundred dollars in goods from my store"?

3. A note is in the following form: "Thirty days after date I promise to pay to the order of X the then market value of ten shares Victor mining stock." Is it negotiable?

4. (*a*) Is a note payable to bearer negotiable? (*b*) Is a note payable on demand negotiable? (*c*) Is a note payable one day after the maker's death negotiable? (*d*) Is a note payable when the maker arrives at the age of twenty-eight negotiable?

5. Is a draft that reads "One month after date pay to the order of A the proceeds of my lands in Washington county, Wisconsin," a negotiable draft?

6. Are the following instruments negotiable: (*a*) I promise to pay C or order one hundred dollars when he marries. (*b*) Pay C or order one thousand dollars out of my share of the estate of X. (*c*) Pay C or order one hundred dollars when he completes the building on my land according to contract. Worden *v.* Dodge, 4 Denio (N. Y.) 159.

7. (*a*) Does the omission of the words "or order," "or bearer," or similar phrases, destroy the negotiability of a bill or note? (*b*) Does the omission of the words "value received" have the same effect or render the paper invalid? ***See statutes in Indiana, Alabama, Missouri and Arkansas.***

8. A signs a note with the amount in blank and intrusts it to B with instruction to fill it in with a certain amount afterward to be ascertained. B fills it in for a larger amount and it is negotiated into the hands of an innocent purchaser for value. Is A liable to such purchaser, and if so, for what amount? Greenfield Bank *v.* Stowell, 123 Mass. 196.

9. A draws a bill on B, who writes thereon his signature and the date alone. Does this constitute an acceptance? (*b*) A bill addressed to B in New York City is accepted by him payable at Albany. Is this a general or qualified acceptance? (*c*) Is the holder bound in the first instance to take such acceptance as the last, and if he does take it, what is the effect upon the liability of drawers and indorsers who do not consent?

10. A in Boston writes to B in New York that he is about to draw upon him at thirty days sight for $500. B replies, saying that the draft will be duly honored. Is B liable to X who discounts the draft for A on the strength of this letter? Exchange Bank *v.* Rice, 98 Mass. 222.

11. (*a*) What bills must be presented for acceptance and why is such presentment required? (*b*) Does a bill due ten days after date require presentment, for acceptance, and if not, would such presentment be proper? *See* Bank *v.* Trippelt, 1 Peters (U. S.) 25.

12. (*a*) What paper must be transferred by indorsement, and what paper may be transferred by delivery only? (*b*) State, generally, the liability of one who transfers commercial paper without indorsement.

13. A makes his note payable to the order of B who indorses it in full to C in whose hands it is dishonored by non-payment. What rights, if any, may C now claim against B, and what steps must he take to preserve them?

14. A, B, C, and D are the successive indorsers of the same note, which is dishonored in the hands of X. May X sue A or any other indorser without suing D from whom he acquired his title?

15. Define a restrictive indorsement and state whether the following indorsement is restrictive: "Pay to X" (signed)?

16. C, the holder of a bill for $100, indorses it, "pay to D, or order, thirty dollars." Is this a valid indorsement?

17. A is a holder for value of a promissory note, which he purchased before maturity and without notice or knowledge of any defense. Which, if any, of the following defenses will defeat an action by him against the maker: (*a*) Incapacity of the maker? (*b*) That the consideration was illegal by the common law? (*c*) That the signature of the maker was forged? (*d*) That the body of the note had been altered without fault of the maker? (*e*) That the instrument was procured by fraudulent misrepresentation as to the consideration? (*f*) That a set-off existed in favor of the maker and against the original payee? (*g*) That it had been paid or compromised?

18. A, who is unable to read English, signs what is read to him as a mere receipt, but which turns out to be a promissory note. Can the holder of such note for value and before maturity recover thereon? How would the case stand had A been able to read, but relied upon the reading of the instrument by the other party? Walker *v.* Ebert, 29 Wis. 194.

19. A buys B's note of C at a discount of 30%, though B is reputed to be not only solvent but wealthy. Is A a bona fide holder, so as to entitle him to recover free from defenses existing between B and C? What effect, if any, would it have upon your decision if B was reputed to be in failing circumstances when the note was purchased? DeWitt *v.* Perkins, 22 Wis. 473.

20. A, the holder of a bill for $100 obtained from the drawer by fraud, deposits it with B as security for a loan of $50 made at the same time. Can B recover anything from the drawer, and if so, how much?

21. Why must commercial paper be presented for payment and what is the effect of non-presentment upon the liability of the drawer? (*b*) Of the maker? (*c*) Of the acceptor?

22. State generally by whom and to whom presentment for payment should be made?

23. A bill is accepted payable at a certain bank and is presented there on the day of maturity, but not until after banking hours

and the officers of the bank have left. What is the effect upon the liability of the drawer and indorser?

24. Upon what paper is "grace" allowed by the rules of the common law, and when should paper be presented where the last day of grace falls on Sunday or a legal holiday? State what changes in the law of grace have been made by the statutes of your own state.

25. A in New York draws a draft in favor of B in Baltimore. The draft is duly presented to C, the drawer, and payment refused by him. B thereupon mails a notice of dishonor promptly on the following morning, properly addressed and postage prepaid, in season to go by mailon that day. The notice miscarries and is never received by A. Is A liable for the dishonor of the paper? Munn *v.* Baldwin, 6 Mass. 316.

26. What is protest and why is it required? (*b*) What paper requires protest and who is the proper party to make it?

27. What is the nature of a deposit in the bank and how does the banker in ordinary cases undertake to repay it?

28. Define a check and point out two characteristics that distinguish it from a bill of exchange.

29. A has $1,000 in the bank and gives his check to B for $100 for a full and valuable consideration. B presents it for payment at the bank, which arbitrarily refuses to honor it. May B sue the bank for the amount of the check? What rights has A against the bank for the dishonor of his check? Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152. Comp. 25 Ill. 35.

30. What is certification and when does it release the drawer from liability in case the check is dishonored? Minot *v.* Russ, 156 Mass. 458.

31. A cashier of a bank certifies his own check, though he has no funds to his credit on the books of the bank. May the bank defend against the payment of the check?

32. Is the bank safe in paying the check after the customer's deposit has been attached, or it has notice of his death?

NOTE.—Generally on this subject of bills and notes, consult the Negotiable Instruments Law recently adopted in many of the states.

AGENCY.

1. (*a*) Define agency. (*b*) How are agents classified with respect to the scope of their authority, and how with respect to the character of their calling? (*c*) State, generally, who may be a principal and who may be an agent. (*d*) When must an agent's authority be under seal in order that he may bind the principal? (*e*) What is a *del credere* agent? (*f*) What is meant by ratification?

2. A wife had from time to time received money due the husband in his business without objection on his part. Is the husband bound by a payment made to her by one who, relying on this practice, supposed her to be authorized, though she had no authority in fact?

3. An agent without express or implied authority to warrant sold the principal's goods with warranty. The principal, with full knowledge of the facts, received the price. Can he set up the agent's lack of authority to give the warranty when sued for its breach?

4. An agent was placed in charge of a lumber yard ostensibly as general manager. He sold a certain lot of lumber contrary to the express instructions of his principal, of which the purchaser had no notice. Was the principal bound?

5. A traveling salesman who had never been held out by the principal as having power to collect money, solicited and received payment of an account due the principal. Is the principal bound by the payment, the agent having embezzled the amount?

6. An agent employed to buy goods for cash supplied goods of his own and took pay at the regular market price without notifying the principal of the facts. Is the principal bound to keep the goods when he learns that his own agent was the seller? Ames *v.* Port Huron, etc., Co., 11 Mich. 139, 83 Am. Dec. 731.

7. An agent wrongfully employed his principal's money in buying goods in his own name, which he sold at a profit. Who is entitled to such profit?

8. An agent was authorized to sell certain stocks at par, but managed to dispose of them at a higher price. Can he keep the excess above their par value? Cutter *v.* Demmon, 111 Mass. 474.

9. An agent, in his own name, deposited his principal's money in bank without distinguishing it in any way as the deposit of the principal. If the bank fails who must bear the loss? *See* Naltner *v.* Dolan, 108 Ind. 500, 58 Am. Rep. 61.

10. A commission merchant sells his principal's goods on the usual terms of credit, but without any inquiry as to the credit or ability of the purchaser, who turned out to have been insolvent. Must the principal stand the loss?

11. An insurance agent was expressly instructed to cancel a certain policy but neglected to do so. There was a loss under the policy which the company was forced to pay. What is the liability of the agent to the company? Phœnix Ins. Co. *v.* Frissell, 142 Mass. 513.

12. An agent employed for a year was discharged at the expiration of six months without cause. He immediately got other employment at the same kind of work but at lower wages. What sum, if any, was he entitled to recover from his first employer at the end of the year? *See* Everson *v.* Powers, 89 N. Y. 527, 42 Am. Rep. 319; Gordon *v.* Brewster, 7 Wis. 355.

13. An agent, by direction of his principal, cut and sold all the timber on a certain tract of land. Was he liable to the owner of the land, though he believed that the timber belonged to his principal? If so, what rights, if any, had he against the principal? How would the case stand if he knew that his act was unlawful?

14. An agent buys goods on credit in his own name without disclosing the agency. May the seller recover the price from the principal upon discovering that the purchase was really for him? How would it affect the case had the principal paid the agent for the goods, supposing that the agent had paid the seller? Thompson *v.* Davenport, 1 B. & C. 78. Comp. Heald *v.* Kenworthy, 10 Exch. 739.

15. An agent, employed to sell goods and having implied power to warrant them, gave a false and fraudulent warranty of their quality. Is the principal liable for the deceit?

16. An agent employed to loan money on collateral security misappropriated the collaterals. Is the principal liable to the pledgor?

17. An agent, authorized to buy land for his principal, purchased with notice of an incumbrance of which his principal was ignorant. Is the principal bound by the incumbrance, though he would not have been had both he and his agent been ignorant of it? Distilled Spirits, 11 Wall. (U. S.) 367.

18. An agent, wholly without authority to do so, accepted a bill in the name of his principal, believing that the latter would ratify his act. Is the agent liable where the principal refused to ratify? Polhill *v.* Walter, 3 Barn. & Adol. 114.

19. An agent, after the death of his principal, bought goods on the credit of the latter, both the agent and the seller being ignorant of the principal's death. Can the seller recover the price from the executors of the principal? Rigs *v.* Cage, 2 Humph. (Tenn.) 330, 37 Am. Dec. 559.

20. A party who was indebted to another gave the latter authority to collect a certain debt and apply the proceeds to the payment of such debt. Is the power of the agent to receive payment affected by the death of the principal? Merry *v.* Lynch, 68 Me. 94.

21. After a principal had been declared a bankrupt, a debt due him was paid to his agent. Did such payment discharge the debt?

22. An agent who has been regularly employed to collect money for his principal, receives a payment after his authority has been revoked, but before the debtor has been notified of the fact. Does the payment bind the principal? Braswell *v.* Insurance Co., 75 N. Car. 8.

PARTNERSHIP.

1. (*a*) Define partnership, and distinguish between the business and legal views of a firm. (*b*) State the leading and common incidents of partnership. (*c*) Is a common stock or capital essential to a partnership? (*d*) Distinguish between a partner's capital and his advances to the firm. (*e*) What is the liability of a partner for the debts of the firm? (*f*) State generally the powers of a partner to bind the firm. (*g*) What is a limited partnership?

2. A, who is engaged in carrying on a mercantile business, borrows money of B, and promises the latter a compensation for its use equal to ten per cent. of the profits of the enterprise. Is B liable as A's partner for the debts of the business? Slade *v.* Paschal, 67 Ga. 541.

3. Suppose A agrees to manage B's business as agent, his compensation to be one-half the profits. Are A and B partners for any purpose?

4. A permitted his name to be used as a partner on the signs, cards, letter heads and statements of the firm, though he was not a member of the firm in fact. (*a*) Is he liable as a partner to one who trusted the firm in the belief that he was actually a partner? (*b*) How would the case stand if the credit had been given by one who never knew of the use of A's name, or who gave credit before it was used at all? Thompson *v.* First Nat'l Bank, 111 U. S. 529.

5. The firm of Oliver, Douglas & Co. is dissolved by the voluntary retirement of Douglas, who gave no notice of his withdrawal except by advertisement. A party who had given credit to the old firm gave further credit in ignorance of the change. Can he hold Douglas liable as a partner? Abel *v.* Sutton, 3 Esp. 108; Amidown *v.* Osgood, 24 Vt. 278.

6. Parties orally agree to become partners for three years. Does this bind the parties to become partners, or to remain such for any definite time? *See* Morris *v.* Peckham, 51 Conn. 128.

7. Articles of partnership are silent as to the duration of the partnership or the proportion in which profits and losses shall be divided. When may one partner withdraw without the consent of the other, and how is it presumed that profits and losses are to be shared?

8. Parties become partners under written articles describing the business of the firm as printing and publishing. Though they do nothing foreign to that business at first, they afterward form a habit, mutually acquiesced in, of buying and selling pianos. Is the firm bound by the purchase of a consignment of pianos from one who knew of its course of dealing?

9. If partners for a definite time remain together and continue business after such time has expired, by what terms in the original articles of partnership are they bound?

10. Partners agree to share profits and losses in proportion to capital. A's capital is fixed at $2,000 and B's at $3,000. Afterward the firm being in need of money borrows $1,000 from A. How are profits to be shared during the period of such loan?

11. A, who owns a business worth $10,000, sells a one-half interest to B for $5,000. Does the $5,000 paid by B for his share become the property or capital of the firm or does it belong to A?

12. A wishes to sell property to the firm of B and S, and S secretly agrees with the seller that he will induce his co-partners to consent to the purchase if he allowed a commission of six per cent. To whom does the commission belong? Grant *v.* Hardy, 53 Wis. 668.

13. A partner in a firm of merchants, being commissioned to replenish a certain part of their stock, delivered his own goods to the firm and took pay for them at the market price without informing his co-partners that he was himself the seller. Is he bound to account for any profit made in the transaction? Bentley *v.* Craven, 18 Beav. 75.

14. A partner by fraud induced a sale of goods to his firm.

Can his co-partners who were innocent of any wrong-doing insist that the sale shall stand?

15. A partner in a trading firm borrowed money ostensibly for the firm and gave a firm note for it. The lender acted in good faith, but the borrowing partner took the money and applied it to his own use. Is the firm bound on the note? Suppose in this particular case the articles of co-partnership had contained a restriction upon the powers of the partner in question to borrow money or give notes, but the lender was ignorant of the fact. Would this change your decision? Warren *v.* French, 6 Allen (Mass.) 317.

16. A and B become partners as attorneys with no agreement as to the time during which the partnership shall continue. A becomes dissatisfied at the end of a month and notifies B that he withdraws from the firm. Can B sue A for thus withdrawing?

17. The firm of A & Co. is dissolved by the voluntary retirement of A, who causes notice of the dissolution to be published in a newspaper of general circulation at the place where the business is carried on. He also mails personal notice to X and others who had previously sold goods on credit to the firm. The written notice to X miscarries through no fault of A, and X did not see the notice in the paper or otherwise have knowledge of it. Is A liable as a partner for goods subsequently supplied by X on the credit of the late firm? *See supra*, Prob. 5.

18. A and B dissolve partnership, B afterward gives a note in the firm name to a firm creditor who is notified of the dissolution, on account of a prior debt of the firm. Has the creditor any remedy against the firm on the note? Has he a remedy on the original debt?

19. A invests $1,000 in money and merchandise against B's skill and experience, profits and losses to be shared equally. The year's business results in a loss of $200. Does B owe A anything, and if so, how much? *See* Meserve *v.* Andrews, 106 Mass. 419.

CORPORATIONS.

1. (*a*) Define a corporation. (*b*) Give three points of difference between a partnership and a corporation. (*c*) What general powers does every corporation possess? (*d*) By what authority are corporations formed? (*e*) What two methods are pursued in forming them, and which of these methods is most common? (*f*) Distinguish between capital and capital stock, and explain the nature of a share of stock. (*g*) Why is the capital stock of a corporation fixed at a certain sum? (*h*) What is a "proxy" in corporation law?

2. A agrees in writing with the managing officers of a corporation already formed that he will take and pay for ten shares of its capital stock. Is he a stockholder? Can he vote at corporate meetings?

3. What is usually necessary before a subscriber to capital stock can be sued by the corporation for the amount of his subscription? Banett *v.* Alton, etc., R. Co., 13 Ill. 504.

4. What is the nature and use of a certificate of stock, and what steps are necessary to a complete transfer of shares.

5. A corporation declares a dividend of ten per cent. on its capital stock. B purchased shares before the dividend was declared, but failed to register his transfer on the books of the company. A, the former owner, who still appears as a shareholder on the books, collected the dividends, the corporation not knowing of the sale. What remedy, if any, has B against the corporation? Has he a remedy against A?

6. A party indorses a stock certificate with a blank assignment and entrusts it to another who is authorized to collect the dividends merely. The agent sells the certificate to a purchaser for value, who does not know that the agent is not the owner. Has such purchaser a right to the stock?

7. Subscribers to the capital stock of a corporation pay only 70 per cent. of their subscriptions. Its business proves unprofitable and it suspends with property insufficient to pay its debts. Have creditors any remedy on account of the unpaid portions of the subscriptions for stock? If the stock was fully paid in would they have any remedy in your state against the stockholders of the insolvent corporation? *See* Sanger *v.* Upton, 91 U. S. 56.

8. The directors of a corporation, which has made a profit of 10 per cent. on the capital stock, refuse to declare a dividend of more than 5 per cent. Have the stockholders any right to compel a dividend of the entire profit?

9. Some days before a cash dividend is declared A sells his shares to B without stipulating as to the ownership of the dividends. Do they belong to A, who owned the stock when the dividend was earned, or to B, who owned it when the dividend was declared? Wheeler *v.* N. W. Sleigh Co., 39 Fed. Rep. 347.

10. A corporation, through its directors, engages in the business of banking, contrary to the express prohibition of a statute. What remedy, if any, has an objecting shareholder, and what remedy, if any, has the state?

SALES OF PERSONAL PROPERTY.

1. (*a*) Define a sale of chattels, and distinguish it from an agreement to sell, (2) from a gift, (3) from a bailment. (*b*) Why is the distinction between a sale and a bargain to sell important? (*c*) What rights has an innocent purchaser of ordinary chattels from a thief or finder? (*d*) Give the substance of the Statute of Frauds so far as it relates to sales of chattels.

2. A buyer induces a sale and delivery of goods to himself by fraudulent representation as to his solvency. Afterward he sells the goods to B, who pays value for them without notice or knowledge of the fraud. Can B hold the goods as against the defrauded seller? *See* Barnard *v.* Campbell, 55 N. Y. 456, 58 N. Y. 73.

3. A sells B a horse, nothing being said about the price. What sum, if any, can A recover of B?

4. B orally agrees to buy 500 tons of coal of A at $4 a ton, on thirty days' time. When the coal is tendered to B he refuses to receive it. Can B prove the contract by witnesses in a suit to recover for A's breach of contract in refusing to take the coal? Suppose A had accepted part of the coal under the contract and resold it, and then refused the rest. Could the oral contract be shown?

5. A memorandum of sale is as follows: "Sold this day 100 bushels wheat at 98c.," signed A. Is this alone sufficient compliance with the statute of frauds? *See* Sanborn *v.* Flagler, 6 Allen, (Mass.) 674; Lincoln *v.* Erie, etc., Co., 132 Mass. 129.

6. Goat skins were sold by the bale, each containing a specified number. By the settled usage of trade it was the duty of the seller to count the skins in each bale, but before this was done the goods were destroyed by fire. Must the buyer or the seller stand the loss?

7. A agrees to buy fifty barrels of pork from a larger quantity contained in B's warehouse. Before any separation or identification of the fifty barrels sold B's creditors attach the property. Can A recover any of it from their hands?

8. A, in Milwaukee, orders goods of B in Chicago, directing him to ship them by Goodrich Transportation Co. They are promptly shipped as directed and upon the ordinary terms, the bill of lading being in the name of A. Does A or B have the risk of loss during transit? See Wheelhouse *v.* Parr, 141 Mass. 543.

9. A party inspects and buys certain hops. There is no concealment or misrepresentation by the seller and no warranty by him. May the buyer sue if the hops are of lower grade or quality than he supposed? What maxim of law applies?

10. A party in possession of goods sells them as his own. He makes no representations as to the title, but they prove to be subject to a chattel mortgage which the buyer is forced to pay $50 to remove. What remedy, if any, has the buyer? Gross *v.* Kerski, 41 Cal. 111.

11. A formal bill of sale of a horse contained a warranty that the horse was under six years old. Can oral evidence be given that at the time of sale the vendor also warranted him sound? Can it be shown that after the sale, the warranty as to age being broken, the seller warranted the horse sound, provided the buyer would not sue for breach of the warranty of age? *See* Seitz *v.* Brewers', etc., Co., 141 U. S. 510.

12. Certain seed was sold as and for "early strap-leaf red top turnip seed." The seed, when planted, turned out to be of a different kind, so that the buyer lost his crop. Is the seller liable in damages?

13. The buyer, without the knowledge of the seller, took a sample of grain from the seller's warehouse and after inspecting it made an offer for the whole lot. After the grain was delivered the bulk, or most of it, was found to be inferior to the sample. Was the seller liable for breach of warranty?

14. Which of the following expressions would usually constitute a warranty in the sale of a horse and which would not?

(*a*) "He is a good horse and easily worth the price."

(*b*) "He is perfectly sound in every particular you may depend."

(*c*) "He is as good as can be had for the money."

(*d*) "He is perfectly sound." In this last case the buyer can readily see that the horse is blind in one eye, which he alleges as a breach of warranty.

15. A sells goods to B without any bargain for credit, and allows B to take them home. Can he recover the goods in the absence of fraud because B fails to pay the price on demand?

16. A buys goods on credit and leaves them in the seller's hands until he shall call for them. He does not call for them until the price is due. Can the seller retain them as security for the price? *See* Arnold *v.* Delano, 4 Cush. (Mass.) 33.

17. A sells B eighteen head of cattle for $540. He pays $440 and takes ten head away, promising to take the others and pay the remaining $100 next day. He calls for the remaining cattle but is not ready to pay the price. May B refuse to deliver any of them? Bradley *v.* Michael, 1 Ind. 551.

18. Define stoppage *in transitu*, and state the conditions upon which the lawful exercise of the right depends?

19. A sells B a horse for $50 and warrants it to be sound but it turns out unsound. Had the horse been as warranted he would have been worth $75, but as it is he is worth $45. How much can B recover for breach of the warranty? Brown *v.* Bigelow, 10 Allen (Mass.) 242.

CONDITIONAL SALES.

1. What is a conditional sale and into what two classes are conditional sales divided?

2. A buys goods upon the installment plan, with the understanding that the title is to remain with the seller until the price is fully paid. If A makes default in paying the last installment,

can the seller retake the goods? If so, must he refund any part of the installments already paid? Latham *v.* Sumner, 89 Ill. 233.

3. A sells B a quantity of wine on condition that it shall arrive in New York on or before June 18, 1900. The wine does not arrive until July 2d. Is B bound to take it?

4. A horse is sold upon condition that the purchaser may try him and return him if he is not satisfied with him after trial. The buyer returned him after a reasonable time, declaring himself dissatisfied. Does it affect the buyer's right of return that he ought to have been satisfied, provided he is honestly dissatisfied? How would the case have stood had the buyer retained the horse unreasonably long?

MORTGAGES OF PERSONAL PROPERTY.

1. (*a*) Define a chattel mortgage and state its force and effect at common law. (*b*) Must the debt secured by mortgage be absolute, or may it be conditional or contingent? (*c*) What rights in equity has a mortgagor of chattels after default?

2. A, in good faith, gave a mortgage to B describing the property as "all my horses, sheep, cattle and hogs now on my farm in Waukesha county, Wisconsin." The property is left in the hands of the mortgagor, but the mortgage is duly recorded. Is it valid against a subsequent purchaser of any or all of such property, who had no knowledge of the mortgage?

3. A, a printer, mortgages his type, cases, engine and presses to B, who fails to record the mortgage. C, without notice or knowledge of the mortgage, purchases the property in good faith. Is the mortgage valid as against C, who had never taken possession of the property?

BAILMENTS.

1. (*a*) Define bailment, and distinguish between bailment and sale. (*b*) Define deposit, mandate, loan for use, and pledge, and designate the different classes of bailments for hire. (*c*) Into what classes are bailments divided with reference to the benefits conferred, and what degree of care and diligence is required under these several heads?

2. A borrows of B, for planting, ten bushels of seed corn. Before the corn is planted it is destroyed while in A's possession, but without negligence on his part. Is A excused from restoring an equal quantity of the same corn or its value?

3. A deposits in a public elevator 500 bushels of wheat, which the warehouseman mingles in the same bins with other wheat of equal grade and quality belonging to himself and others. Is this a bailment so as to excuse the warehouseman from making return of a like quantity of grain, if the property is destroyed without fault or negligence on his part? *See* Bretz *v.* Diehl, 117 Pa. St. 589, 2 Am. St. Rep. 706.

4. A agrees to store certain goods for B without reward. Is he bound to accept them when they are offered for storage? If he does take possession of them under the agreement, what degree of care, if any, is he bound to exercise and what is the consideration, if any, for his undertaking to exercise it?

5. A dressmaker received cloth to be made into dresses. In the exercise of such care and skill as the average of her craft possess she should have known the right side of the cloth from the wrong side. Through ignorance or carelessness she made up the cloth wrong side out. Is she liable to her customer?

6. A deposits his money in a bank in the ordinary way, subject to check, receiving credit in his pass-book for the amount. Does the fact that the bank, without negligence, was robbed of the identical funds deposited excuse it from honoring A's checks?

7. A banker accepts for safe keeping a package of money and securities marked with the depositor's name. The deposit is shortly afterward appropriated by the banker's cashier, who has hitherto borne a good reputation and has done nothing to excite the banker's suspicions. Is the banker liable for the loss? Foster *v.* Essex Bank, 17 Mass. 479.

8. A party hires a piano for use in his dwelling, but without the owner's knowledge puts it in an adjoining dance hall open to public use. It is there destroyed by fire, happening without the bailee's negligence. Is the bailee liable for the loss?

9. Distinguish between warehousemen, liverymen, agisters and wharfingers?

10. A warehouseman in a small town, where the value of goods deposited with him was never great, neglected to employ a night watchman. Goods stored with him were destroyed by fire. Was the warehouseman liable for negligence, assuming that the employment of such watchman would have prevented the loss? *See* Pike *v.* Railroad Co., 40 Wis. 583.

11. What is a warehouse receipt and what in general is the effect of its assignment?

PLEDGE.

1. (*a*) Define pledge and state when the term collateral security is commonly employed. (*b*) How should bills and notes be pledged in order to give the pledgee the rights of a bona fide holder to the amount of his advances? (*c*) What are the usual steps in a pledge of stock?

2. A pledgee of negotiable promissory notes, without special authority, sells the same at public auction for less than their real value, upon default being made in the payment of the debt secured. Is he liable to the pledgor in damages? Joliet Iron Co. *v.* Scioto Fire Brick Co., 82 Ill. 549.

3. One to whom a note was pledged neglected to present it to the maker at maturity, whereupon the indorser was released. The amount of the note being lost, what was the liability of the pledgee to the pledgor?

CARRIERS.

1. (*a*) Distinguish between common carriers and mere private or occasional carriers of goods. (*b*) What is the duty of a common carrier with respect to the receipt of goods for carriage, and what is his common law liability for loss or injury during transit?

2. A railroad company agrees that if it is allowed to carry certain grain in sacks it will bring back the empty sacks free of charge. Is it liable as a common carrier for loss of the empty sacks, or only as a gratuitous bailee? Pierce *v.* Railroad, 23 Wis. 387.

3. A merchant brought goods to the carrier's warehouse, requesting that they be kept a few days when he would give shipping directions. If they are destroyed by fire in the meantime is the carrier liable, provided he or his servants were free from negligence? Would your answer be the same had the goods been delivered for immediate shipment? St. Louis, etc., R. *v.* Montgomery, 39 Ill. 335.

4. Describe the nature and use of a bill of lading.

5. A consignment of furniture was being duly transported through St. Louis, where it was destroyed by the great cyclone of a few years ago. Is the carrier liable for the loss?

6. A shipper, against the protests of the carrier's agent, insists on shipping a buggy on a flat car, and sees to the loading of it himself. It is blown from the car when in motion and practically destroyed. Who must bear the loss? Miltimore *v.* Railroad Co., 37 Wis. 190.

7. A bill of lading or shipping receipt provides that "all goods are at shipper's risk of fire," etc. The goods are destroyed by a

fire set by the negligence of the carrier's servants though without the carrier's personal fault. Who must bear the loss?

8. A bill of lading provides that in no case shall the carrier be liable beyond the sum of $20, in case the property carried is lost, unless a higher valuation is expressly set upon them at the time of shipment. The goods are lost by collision due to negligent management by the carrier's servants. Is the shipper limited to the recovery of $20? *See* Hart *v.* Railroad Co., 112 U. S. 331.

9. Goods shipped by rail arrive safely and are stored in the carrier's warehouse. Before the shipper has been notified of their arrival or has had reasonable opportunity to remove them they are destroyed by a fire, in no way due to the negligence of the carrier. What is the carrier's liability under the Massachusetts rule? What is his liability under the rule in New Hampshire? *See* Norway Plains Co. *v.* Railroad, 1 Gray 263; Moss *v.* Railroad, 32 N. H. 523.

10. How does the liability of a carrier of passengers for the safety of their baggage differ from his liability for the safety of their persons?

11. A railway company receives a passenger's trunk without knowledge or notice of its contents. It contains, besides ordinary wearing apparel, a quantity of jewelry intended for sale. The trunk being lost without gross negligence or willful wrong of the carrier, what is his liability to the passenger?

INNKEEPERS.

1. Who are deemed innkeepers and what are their duties and responsibilities by the common law? *See* Calye's Case, 8 Coke 32, s. c. 1 Sm. L. C. 249.

2. A party whose residence and place of business are in the same town with the inn arranged for board and lodging at such inn for a fixed price per week. A fire originating in an adjoining house destroys the goods of the customer. Is the innkeeper liable as an insurer for their loss?

3. What is the nature of an innkeeper's lien and upon whose goods does it attach at common law?

GUARANTY AND SURETYSHIP.

1. (*a*) Define guaranty and suretyship? (*b*) Distinguish between a guaranty and an ordinary indorsement? (*c*) What are some of the distinctions between guaranty and suretyship?

2. A borrows money of B, and C, in order to induce the loan, signs as joint maker with A. Is C a principal or a surety, so far as B and others with notice of the facts are concerned?

3. A holds B's note for $200, which is nearing maturity. A expresses fears as to B's solvency, and C thereupon writes and signs on the back of the note the following: "For value received I hereby guarantee the payment of the within note." Nothing of value having really passed from A to C, and no further credit or indulgence being given to B, is C bound by the guaranty? *See* Bickford *v* Gibbs, 8 Cush. (Mass.) 156.

4. Are express contracts of guaranty or suretyship valid if oral, and if not, what particular law or statute applies?

5. A buys grain from C and gives K's note in payment, orally guaranteeing it good and collectible. Is A bound by his guaranty? *See* Dows *v*. Sweet, 134 Mass. 142.

6. Is the following written and signed guaranty upon a note given for money loaned to the maker valid in your state: "I hereby guarantee collection of the within note"?

7. A gave B a letter to X which read as follows: "Kindly let B have such goods as he may want from your stock to an amount not exceeding $450, and I will be responsible for his payment of the debt within thirty days from date of invoice." X let B have the goods but did not notify A of the fact for two months after the sale. B had failed in the meantime. Is A liable on the guaranty? *See* Davis *v*. Wells, 104 U. S. 159.

8. In which of the following cases does the language import a continuing, and in which does it import a non-continue guaranty?

(*a*) "Let X have what lumber he wants, and I will guarantee the same." (*b*) "Let X have what dry goods he may want from time to time, and I will see you paid." (*c*) "The bearer, my son-in-law, wishes to put a stock of groceries in his store at this place. To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order." Knowlton *v.* Hersey, 76 Me. 345.

9. Is a strict surety released by lack of notice of the principal's default? What is the rule as to guarantors?

10. A guaranteed the "collection" of B's note. C, the creditor, neglected to take any steps to collect from B for over a year, except to dun him diligently. C then sued B, but the execution was returned unsatisfied. May he hold the guarantor liable, particularly where B becomes insolvent in the meantime? Would your conclusion be the same had the guaranty been of "prompt payment at maturity?" *See* Salt Springs Nat'l Bank *v.* Pratt, 135 N. Y. 423.

11. A lends money to B on his note secured by chattel mortgage, and indorsed by C as surety. How would C's liability as surety be affected by A's negligent failure to record the mortgage whereby its security was lost?

12. A debtor is in default in paying the interest on his debt when due. The creditor, in consideration of the immediate payment of such interest, extended the time for paying the principal sixty days, without the consent of a surety for the debt. Why is such surety still bound?

13. A became surety for the faithful and honest discharge by B of the duties of book-keeper in a certain bank. B is made teller without notice to or consent of A. Is A bound for B's defaults as teller? *See* National, etc., Assn. *v.* Conkling, 90 N. Y. 116.

FIRE INSURANCE.

1. (*a*) What is the theory of property insurance? (*b*) Define fire insurance and explain what is meant by *premium, policy, risk, underwriter*. (*c*) What is meant by insurable interest? (*d*) What is meant by "wager policy"? (*e*) What is reinsurance?

2. A man insures property belonging to his uncle in the mere expectation that the latter may leave it to him by will. Is the policy valid?

3. A church is insured simply "against loss or damage by fire." A lightning stroke wrecks the steeple, but there is no actual ignition of the structure. Are the insurers liable?

4. A party takes out a policy on his warehouse for $5,000. At the time of effecting the insurance he represents that there is already $5,000 insurance on the warehouse, being honestly forgetful that such insurance is not on the warehouse but on the goods therein. Is the policy valid? *See* Armour *v.* Insurance Co., 90 N. Y. 450.

5. A takes out a policy of insurance on his barn, concealing from the insurers the fact that recent and repeated attempts have been made to burn it. Is the policy valid?

6. A sells his house to B and assigns over to him in writing a policy of insurance thereon. Nothing is said to the insurers about this transaction, and the policy contains no clause forbidding assignment. Can B recover of the company in case of loss? White *v.* Robbins, 21 Minn. 370.

7. A policy against fire in its written portion expressly describes property insured as a furniture factory. A printed clause in the policy expressly provides that the keeping of benzine on the premises shall render such policy void. It appears that the use of benzine is customary and necessary in the conduct of the furniture manufacturing business. Does the keeping of a reason-

able amount of benzine for such use render the policy void? *See* Faust *v.* Insurance Co., 91 Wis. 158.

8. A fire policy provides that it shall be void unless the insured shall, in case of loss, give the company immediate notice thereof in writing. The insured neglects to give notice for a full month after the fire. Can the company defend on the ground that notice was not seasonably given? Could it defend notwithstanding the lack of notice, if its agents had proceeded to adjust the loss without objection? Central City Ins. Co. *v.* Oates, 86 Ala. 558.

9. A insures his store in the Hartford for $2,000; Mechanics', $2,000; Continental, $4,000, and in the Manchester for $4,000. It suffers damage to the extent of $6,000. All these policies contain the usual provisions as to other insurance which all of them permit. What companies are liable for the loss and for what sums?

OTHER FORMS OF INSURANCE.

1. (*a*) Define life insurance and state in what important particular it is thought to differ from property insurance. (*b*) What is accident insurance and what particular form of indemnity dose it usually provide? (*c*) Name and describe four other kinds of insurance. (*d*) What is meant by "beneficiary"?

2. A woman takes out a policy of insurance on the life of her husband, paying the premiums herself. A divorce is granted her without alimony, thus putting an end to her insurable interest. She continues paying the premiums, however, until her husband dies. Can she recover the amount of the policy? Connecticut Mut. Life Ins. Co. *v.* Schaefer, 94 U. S. 457.

3. A life policy provides that it shall not take effect until the first premium is paid. The officers of the company, however, consent to take the note of the insured for such first premium, due in thirty days, and deliver the policy. If the insured dies at the end of ten days can the company defend on the ground that the first premium was not paid?

4. A written application for insurance provides that the statements therein shall be deemed a part of the policy and warranties therein. The insured states in such application that he is in good health. It proves that at the time he was suffering from a mild form of dyspepsia, not likely to shorten life nor generally regarded as having that tendency. Is the policy void?

5. Is an understatement of his age by an applicant for insurance a material misrepresentation? Alabama Gold Life Insurance Co. *v.* Garner, 77 Ala. 210.

6. A policy contains a clause declaring it void if the insured shall commit suicide. In the delirium of fever and without apparent consciousness of the nature of his act the insured jumps from a window and is killed. May the beneficiary enforce the policy? **Bigelow *v.* Berkshire Life Ins. Co., 93 U. S. 284.**

REAL PROPERTY AND CONVEYANCES.

1. (*a*) Define real property. (*b*) What is incorporeal real property? (*c*) What are fixtures and when must a tenant remove them? (*d*) What is an estate in fee-simple? (*e*) What is meant by waste? (*f*) What are emblements, and who may claim them? (*g*) Define curtesy and dower. (*h*) Distinguish between joint tenancy and tenancy in common. (*i*) What is a homestead and what constitutes a homestead in your state? (*j*) What are the emblements, and who may claim them?

2. A deed of a farm simply describes it by metes and bounds, saying nothing about crops or buildings. Is the grantor entitled to take the growing crops as they mature, or to remove the buildings then on the land? *See* Mott *v.* Palmer, 1 N. Y. 564.

3. The lessee of a machine shop attaches to the ceiling by straps and bolts certain pulleys, hangers and shafting, and an engine and boiler to the floor and joists by means of rods and bolts. Is he entitled to remove them before the expiration of his lease?

4. (*a*) How must a contract to convey land be made and by what means must the conveyance be effected? (*b*) Define a deed and distinguish between a warranty deed and a quitclaim deed. (*c*) What covenants are usually found in a warranty deed? (*d*) What is meant by acknowledgment of a deed, and what is the usual effect of a failure to acknowledge it? (*e*) How many witnesses are necessary to a deed in your state?

5. A conveys land to B by a deed containing a covenant that the grantor will forever warrant and defend the grantee against all persons lawfully claiming the land. If B is evicted by persons having paramount title, what is the measure of his damages against A?

6. A conveys his land to B, who fails to record the deed. While A is still in possession of the land he makes a second con-

veyance of the same to X, who pays value for it in good faith without notice or knowledge of the deed to B. X records his deed, while B's deed is still unrecorded. Who will hold the property, B or X? Buchanan *v.* Bank, 78 Ill. 500.

7. A husband conveys a tract of land belonging to himself without his wife joining in the deed. What interest, if any, may the grantor's wife claim in such land as against the grantee if she becomes a widow? What effect, if any, in passing title, would the husband's sole deed have in your state, supposing that the land in question were a homestead?

MORTGAGE OF REAL PROPERTY.

1. (*a*) Define a formal mortgage of realty, and describe its operation by the early common law. (*b*) What is the general effect of a mortgage at the present time? (*c*) With what formalities should a mortgage be executed? (*d*) What is the nature and purpose of a satisfaction of mortgage? (*e*) What is meant by foreclosure, and why is such a proceeding necessary?

2. A mortgagor tenders the full amount of the mortgage debt on the day when it is due, but the mortgagee refuses to accept the tender. What effect has this tender on the mortgage debt? What effect has it on the lien of the mortgage? Shields *v.* Lozear, 34 N. J. Law 496. Comp. Kortwright *v.* Cady, 21 N. Y. 343.

LANDLORD AND TENANT.

1. How does the relation of landlord and tenant arise? (*b*) When must a lease be in writing in your state? (*c*) When must it be by deed? (*d*) What is rent? (*e*) Distinguish between assignment and subletting.

2. A tenant covenants to pay rent during a certain term for certain premises on which are a dwelling-house and stable. The buildings are so seriously damaged by fire as to be untenantable, and the tenant refuses to pay further rent until they are repaired. The lease contains no express covenant to repair on the part of either party and no express provision covering such disasters. Can the landlord enforce payment of rent for the rest of the term? If so, has the tenant any remedy on account of the failure of the landlord to repair? Suppose, in this case, that the tenant had entered into a general covenant to repair, would the fact that the fire was accidental excuse him from so doing? Gates *v.* Green, 4 Paige (N. Y.) 355. *See* Wattles *v.* S. Omaha, etc., Co., 50 Neb. 25, 36 L. R. A. 424.

3. A leases certain premises to B at an annual rental of $600, to be paid in six equal monthly installments. After the expiration of the lease B remains in possession and the landlord receives the rent then accruing without any new agreement being made as to the terms of leasing. What kind of a tenancy exists between the parties and when and how may it be terminated?